

No. 90-1014-CFX
Status: GRANTED

Title: Robert E. Lee, individually and as Principal of
Nathan Bishop Middle School, et al., Petitioners
v.
Daniel Weisman, etc.

Docketed:

December 21, 1990

Court: United States Court of Appeals
for the First Circuit

Counsel for petitioner: Cooper, Charles J.

Counsel for respondent: Blanding, Sandra A.

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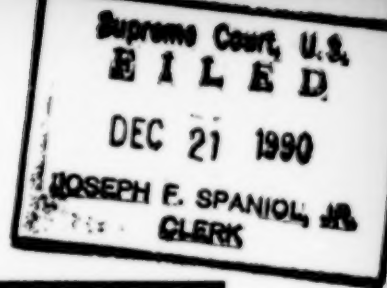
Entry	Date	Note	Proceedings and Orders
1	Oct 16 1990	G	Application (A90-292) to extend the time to file a petition for a writ of certiorari from October 21, 1990 to December 20, 1990, submitted to Justice Souter.
2	Oct 18 1990		Application (A90-292) granted by Justice Souter extending the time to file until December 21, 1990.
3	Dec 21 1990	G	Petition for writ of certiorari filed.
5	Jan 17 1991		Order extending time to file response to petition until February 22, 1991.
6	Jan 18 1991		Brief amicus curiae of National Assn. of State Boards of Education filed.
7	Jan 18 1991		Brief amici curiae of Utah, et al. filed.
8	Feb 22 1991		Brief amicus curiae of United States filed.
9	Feb 22 1991		Brief amicus curiae of National School Boards Assn. filed.
10	Feb 22 1991		Brief of respondent Daniel Weisman in opposition filed.
11	Feb 27 1991		DISTRIBUTED. March 15, 1991
12	Mar 18 1991		Petition GRANTED. *****
14	Apr 17 1991		Order extending time to file brief of petitioner on the merits until May 24, 1991.
15	May 2 1991		Brief amicus curiae of Clarendon Foundation filed.
18	May 2 1991		Brief amicus curiae of Liberty Counsel filed.
16	May 8 1991		Brief amici curiae of The Rutherford Institute, et al. filed.
17	May 14 1991		Brief amicus curiae of The Southern Baptist Convention Christian Life Commission filed.
19	May 23 1991		Brief amicus curiae of United States Catholic Conference filed.
20	May 24 1991		Brief amicus curiae of Institute in Basic Life Principles filed.
21	May 24 1991		Brief amicus curiae of Delaware filed.
22	May 24 1991		Brief amici curiae of Focus on the Family, et al. filed.
23	May 24 1991		Brief amicus curiae of National Legal Foundation filed.
24	May 24 1991		Brief amicus curiae of United States filed.
25	May 24 1991		Brief amici curiae of Christian Legal Society, et al. filed.
26	May 24 1991		Brief amicus curiae of National School Boards Association filed.
27	May 24 1991		Joint appendix filed.
28	May 24 1991		Brief of petitioners Robert Lee, et al. filed.
29	May 24 1991		Brief amici curiae of Concerned Women for America, et al.

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Entry	Date	Note	Proceedings and Orders
			filed.
32	May 24 1991		Brief amicus curiae of National Jewish Commission on Law and Public Affairs filed.
33	May 24 1991		Brief amicus curiae of Board of Education of Alpine School District filed.
34	May 24 1991		Brief amici curiae of Specialty Research Associates, Inc., et al. filed.
35	May 31 1991	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
36	Jun 17 1991		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
38	Jun 18 1991		Order extending time to file brief of respondent on the merits until July 17, 1991.
39	Jun 26 1991		Brief amicus curiae of Americans for Religious Liberty filed.
42	Jul 10 1991		Brief amici curiae of American Jewish Congress, et al. filed.
41	Jul 16 1991		Brief of respondent Daniel Weisman filed.
40	Jul 17 1991		Brief amici curiae of Council on Religious Freedom, et al. filed.
43	Jul 17 1991		Brief amici curiae of National PEARL, et al. filed.
44	Jul 30 1991		CIRCULATED.
45	Aug 5 1991		Certified copy of C.A. proceedings, 7 vols., received.
46	Aug 16 1991	X	Reply brief of petitioners Robert Lee, et al. filed.
47	Sep 5 1991		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 6, 1991. (1ST CASE)
48	Oct 25 1991		Record filed.
		*	Original proceedings, United States District Court, District of Rhode Island. (1 folder)
49	Nov 6 1991		ARGUED.

90-1014

(1)



No. _____

**IN THE SUPREME COURT OF THE
UNITED STATES**

October Term, 1990

ROBERT E. LEE, ET AL.,
Petitioners,

v.

DANIEL WEISMAN, ETC.,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

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December 21, 1990

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QUESTIONS PRESENTED

1. Do school authorities violate the Establishment Clause by allowing a speaker at a public junior high or high school graduation ceremony to offer an invocation and a benediction that acknowledge a diety?

2. Whether direct or indirect government coercion is a necessary element of an Establishment Clause violation?

THE PARTIES

1. The petitioners in this case, who were the appellants in the court of appeals, are Robert E. Lee, individually and as principal of Nathan Bishop Middle School of Providence, Rhode Island; Thomas Mezzanotte, individually and as principal of Classical High School of Providence, Rhode Island; Joseph Almagno, individually and as superintendent of the Providence School Department; and Vincent McWilliams, Robert DeRobbio, Mary Bastastini, Albert Lepore, Roosevelt Benton, Mary Smith, Anthony Caprio, Bruce Sundlun, and Roberto Gonzalez, individually and as members of the Providence School Committee.

2. The respondent in this case, who was the appellee in the court of appeals, is Daniel Weisman, personally and as next friend of Deborah Weisman.

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**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

Petitioners respectfully pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is not yet reported, but is reproduced in the appendix at App. 1a.

The opinion of the United States District Court for the District of Rhode Island is reported at 728 F. Supp. 68, and is reproduced in the appendix at App. 18a.

JURISDICTION

The opinion of the United States Court of Appeals for the First Circuit was entered on July 23, 1990. No petitions for rehearing were filed. On October 19, 1990, Justice Souter extended the time for filing this petition to and including December 21, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Establishment Clause of the First Amendment to the United States Constitution, which provides: "Congress shall make no law respecting an establishment of religion."

STATEMENT OF THE CASE

A. The Graduation Ceremony

For many years the Providence School Committee and Superintendent have permitted school principals to include invocations and benedictions delivered by clergy of various faiths in the graduation ceremonies of the city's public junior high and high schools. App. 19a. The schools provide the clergy with guidelines for the ceremonies prepared by the National Conference of Christians and Jews, which stress inclusiveness and sensitivity in authoring nonsectarian prayer for public civic ceremonies. App. 19a.

Respondent Daniel Weisman's daughter, Deborah, was graduated from Nathan Bishop Middle School, a public junior high school in Providence, in June 1989. App. 19a. Rabbi Leslie Gutterman of the Temple Beth El of Providence performed the invocation and benediction at the ceremony. App. 19a.

Four days before the ceremony, respondent sought a temporary restraining order to prevent the inclusion of invocations and benedictions in the graduation ceremonies of the Providence public junior high and high schools.¹ App. 19a. The district court denied the motion the day before the ceremony, due to lack of time to consider it adequately before the scheduled event. App. 19a-20a.

On June 20, 1989, Deborah Weisman and her family attended the scheduled graduation ceremony at Bishop Middle School. App. 20a. Rabbi Gutterman's invocation addressed a deity at the beginning, and concluded with "Amen."² App. 20a. The benediction opened with a reference to God, asked God's blessing, gave thanks to the Lord, and concluded with "Amen."³ The district court characterized both the invocation and the

¹ Respondents invoked the jurisdiction of the district court under 28 U.S.C. 1331, 1343, 2201, and 2202, as well as the court's pendent and ancillary jurisdiction.

² The invocation, in its entirety, read as follows:

God of the Free, Hope of the Brave:

Footnote continued on next page

benediction as "examples of elegant simplicity, thoughtful content, and sincere citizenship." App. 20a.

Deborah Weisman entered Classical High School in Providence in September 1989, and she has continued to attend that school since then. In July 1989, respondent filed an amended complaint in this action, seeking a permanent injunction against invocations and benedictions in future graduation ceremonies of the Providence public junior high and high schools. App.

Footnote continued from previous page

For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all can seek justice we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN

App. 20a.

³ The benediction, in its entirety, read as follows:

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

The graduates now need strength and guidance for the future. Help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

AMEN

App. 20a-21a.

21a. The district court ruled in favor of respondent and granted the requested relief.

B. The District Court Decision

The district court's Establishment Clause analysis, which the court of appeals majority characterized as "sound and pellucid" and adopted as its own, App. 2a, opened with the observation that under this Court's precedents "God has been ruled out of public education as an instrument of inspiration or consolation" because of "the perceived sensitive nature of the school environment and the apprehended effect of state-led religious activity on young, impressionable minds." App. 21a-22a. The district court determined that the invocation and benediction failed under the second prong of the three-prong test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The practice impermissibly advanced religion "by creating an identification of school with a deity." App. 24a. According to the district court, "the Providence School Committee ha[d] in effect endorsed religion in general by authorizing an appeal to a deity in public school graduation ceremonies." App. 25a. The district court did not reach the other inquiries under *Lemon* — whether the practice had a secular purpose and whether it fostered an excessive entanglement with religion.

The district court expressly declined to follow the Sixth Circuit's reasoning in *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), which held that nondenominational invocations and benedictions in public school graduation ceremonies are not *per se* unconstitutional. The *Stein* court had relied upon *Marsh v. Chambers*, 463 U.S. 783 (1983), in which this Court rejected an Establishment Clause challenge to the Nebraska legislature's practice of opening each day's session with a prayer offered by a paid chaplain. The district court here, however, concluded that the "*Marsh* holding was narrowly limited to the unique situation of legislative prayer." App. 27a. As proof of this point, the district court noted that *Marsh* was the only case since 1971 in which the Court did not apply the *Lemon* test. The district court also noted that application of the *Marsh* analysis in the context of graduation invocations and benedictions would result in courts "reviewing the content of prayers to judicially approve what are acceptable invocations to a deity." App. 27a.

Finally, the district court made clear that Rabbi Gutterman's invocation and benediction were unconstitutional solely because they made reference to a deity:

[N]othing in this decision prevents a cleric of any denomination or anyone else from giving a secular inspirational message at the opening and closing of the graduation ceremonies. Counsel for plaintiff conceded at argument, as she must, that if Rabbi Gutterman had given the exact same invocation as he delivered at the Bishop Middle School on June 20, 1989 with one change — God would be left out — the Establishment Clause would not be implicated.

App. 28a. To punctuate the point, the court recast a new version of Rabbi Gutterman's invocation, one cleansed of its reference to God and, thus, of its perceived constitutional infirmity. App. 28a.⁴

C. The Court of Appeals Decision

A majority of the Court of Appeals for the First Circuit affirmed, over a dissenting opinion by Judge Campbell. The panel majority simply endorsed the district court's opinion and did not elaborate further. App. 2a.

Judge Bownes concurred separately, concluding that the invocation and benediction violated all three prongs of the *Lemon* test. Noting that "[a] graduation ceremony does not need a prayer to solemnize it," Judge Bownes concluded that the primary purpose of the practice is religious. App. 9a-10a. Judge Bownes also believed that the practice fostered an excessive entanglement with religion by virtue of the School Committee's policies of providing guidelines for the composition of nondenominational invocations and of permitting school authorities to select the speakers. App. 10a-11a.

Judge Bownes also found this Court's decision in *Marsh* inapposite. *Marsh*, according to Judge Bownes, "was based on the 'unique' and specific historical argument that the framers did not find legislative prayers offensive to the Constitution because the First Congress approved of legislative

4 The district court made no secret of its discomfort with the result of its ruling:

The fact is that an unacceptably high number of citizens who are undergoing difficult times in this country are children and young people. School-sponsored prayer might provide hope to sustain them, and principles to guide them in the difficult choices they confront today. But the Constitution as the Supreme Court views it does not permit it Those who are anti-prayer thus have been deemed the victors. That is the difficult but obligatory choice this Court makes today.

App. 29a.

prayers." App. 11a. *Marsh* did not apply here "since free public schools were virtually nonexistent at the time the Constitution was adopted." App. 11a, quoting *Edwards v. Aquillard*, 482 U.S. 578, 583 n.4 (1987). Thus, Judge Bownes rejected the Sixth Circuit's analysis in *Stein*, and also criticized that court's "troubling" inquiry into the nondenominational content of the challenged invocation. App. 12a. Finally, Judge Bownes stated that the Establishment Clause would have been offended by Rabbi Gutterman's invocation and benediction even if cleansed of their references to a deity. Noting that invocations and benedictions "are by their very terms prayers and religious," Judge Bownes concluded that the practice "offends the First Amendment even if the words of the invocation or benediction are somehow manipulated so that a deity is not mentioned." App. 13a.

In dissent, Judge Campbell believed that "*Marsh* and *Stein* provide a reasonable basis for a rule allowing invocations and benedictions on public, ceremonial occasions," so long as school authorities take care to invite speakers representing a wide range of religious beliefs and nonreligious ethical philosophies. App. 16a.

REASONS FOR GRANTING THE WRIT

This case starkly presents a conflict in the circuits over the proper application of, and interrelationship between, two of this Court's most important Establishment Clause precedents — *Lemon* and *Marsh*. The courts below viewed any official ceremonial reference to a deity as an endorsement of religion, conveying a "tacit preference" for religion in violation of this Court's teaching in *Lemon*. At the same time, the courts below dismissed *Marsh* as a narrow exception to *Lemon*, extending only to official religious practices, such as legislative prayer, that were well known and broadly accepted when the First Amendment was framed in 1791 — an exception inapplicable here because the origins of public schooling in this country can be traced back only a century and a half. The courts in this case thus adopted an understanding of *Marsh* directly at odds with that of the Sixth Circuit in *Stein*, which viewed nondenominational invocations at public school graduation ceremonies as analogous to the legislative prayers upheld in *Marsh*.

The scope and importance of the ruling in this case is enormous, going far beyond the abrupt termination in the states of the First Circuit of a venerable tradition practiced in public school graduation ceremonies throughout the country and expressly approved in the Sixth Circuit. Under

the Court of Appeals' ruling, it is clear that all references to a deity must be cleansed from public school graduation ceremonies. For example, recitation of the Pledge of Allegiance would be forbidden. Similarly, commencement speakers will have to take care to avoid references to a deity in their remarks to graduates. The Reverend Martin Luther King's well-known commencement address to the 1961 graduating class of Lincoln University could not, consistent with the rulings below, be delivered at the 1991 graduation ceremony of a Providence public high school.⁵

The startling proposition that the familiar tradition of invocations and benedictions must be expelled from one of those rare and solemn gatherings by which young people collectively mark an important passage in their lives — and thus contemplate the purposes of their lives — is reason enough for this Court to take up the issue decided in this case. But the reasoning of the courts below cannot be confined to public school graduation ceremonies. The invocation and benediction at issue in this case are but a single and unremarkable manifestation of the long-standing and broad tradition of official acknowledgment of religious values in the public life of the nation. If the courts below have correctly stated the law, then a staggering variety of ceremonial and familiar practices in our public life must be censored to exclude forbidden references to the deity, just as the district court below revised Rabbi Gutterman's invocation. Such a result is contrary to the teachings of this Court, is in conflict with other lower court decisions, and is, ultimately, at war with the values enshrined in the Religion Clauses of the First Amendment.

⁵ King's speech contained a number of references to the deity, including the following observation:

Black supremacy is as dangerous as white supremacy, and God is not interested in merely in the freedom of black men and brown men and yellow men. God is interested in the freedom of the whole human race and in the creation of a society where all men can live together as brothers, where every man will respect the dignity and the worth of human personality.

King concluded his commencement address with the same stirring words later made famous in his "I Have A Dream" speech delivered from the steps of the Lincoln Memorial on August 28, 1963:

That will be the day when all of God's children, black men and white men, Jews and Gentiles, Catholic and Protestants, will be able to join hands and sing in the words of the old Negro spiritual "Free at last! Free at last! Thank God Almighty we are free at last!"

I CEREMONIAL ACKNOWLEDGMENTS OF RELIGION DO NOT VIOLATE THE ESTABLISHMENT CLAUSE

A. As this Court recognized in *Marsh v. Chambers*, our Nation has a long tradition of ceremonial acknowledgments of religion. From its inception, the Congress has begun its legislative sessions with an invocation by a paid chaplain. 463 U.S. at 787-88. See also *Lynch v. Donnelly*, 465 U.S. 668, 673-74 (1984). The same practice has been followed in state legislatures across this land, *Marsh*, 463 U.S. at 788-89. The practice was also followed by the Continental Congress from its inception in 1774. *Id.* at 786-87.

This Court itself, and the lower Federal courts, have long opened their daily proceedings with the invocation "God save the United States and this Honorable Court." *Id.* at 786. George Washington, in his first inaugural address, also sought the blessings of God, "that Almighty Being," and "the Great Author of every public and private good." G. Washington, First Inaugural Address, in 1 *Messages and Papers of the Presidents* 44 (J. Richardson ed. 1897). At the conclusion of Washington's inaugural, the new President and both Houses of Congress attended a religious service conducted by the first Episcopal bishop of New York at St. Paul's Chapel in New York City, in accordance with a joint Congressional resolution providing for the service. See A. Stokes & L. Pfeffer, *Church and State in the United States* 87 (Rev. 1st ed. 1964). Presidents to this day have continued to make references to God at public events. The inauguration of President Bush included an invocation and a benediction by the Reverend Billy Graham, and a prayer by President Bush himself. 135 Cong. Rec. S67 (daily ed. Jan. 20, 1989).⁶

At this nation's birth, the Declaration of Independence appealed "to the Supreme Judge of the world" and to "the laws of nature and of nature's

⁶ The invocation offered by Rev. Graham read,
Our Father and our God, Thou hast said blessed is the nation whose
God is the Lord.
We recognize on this historic occasion that we are a nation under God.
This faith in God is our foundation and our heritage

We acknowledge thy divine help in the selection of our leadership
each 4 years.

County of Allegheny v. American Civil Liberties Union, 109 S. Ct. 3086, 3142 n.9 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

God." It also proclaimed that all men "are endowed by their Creator with certain inalienable rights," and relied on "the protection of Divine Providence." The day after proposing the First Amendment, Congress called on President Washington to proclaim "a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God." *Lynch*, 465 U.S. at 675 n.2. The President responded by proclaiming November 26, 1789, as a day of thanksgiving in which to offer "our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions." *Id.* Virtually every President since Washington has similarly proclaimed a national day of prayer and thanksgiving.⁷ Today Thanksgiving is a national holiday, as is Christmas, despite the fact that "[Thanksgiving] has not lost its theme of expressing thanks for Divine aid any more than has Christmas lost its religious significance." *Id.* at 675 (footnote omitted).

Other official acknowledgments of religion abound. The legend "In God We Trust" has been inscribed on our nation's currency since 1865, 31 U.S.C. 5112(d)(1), and was made the national motto in 1956. 36 U.S.C. 186. In 1950, Congress designated Memorial Day as a day of "prayer for a permanent peace." 36 U.S.C. 169g. In 1952, Congress directed the President to proclaim a National Day of Prayer each year "on which [day] the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U.S.C. 169h. The Pledge of Allegiance to the flag was revised by Congress in 1954 to describe the United States as "one nation under God," 36 U.S.C. 172, and this Pledge is recited numerous times each year by school children across the country. *Lynch*, 465 U.S. at 676. Presidential proclamations and messages have issued to commemorate Jewish Heritage Week, Proclamation No. 4844, 46 Fed. Reg. 25077 (1981), and the Jewish High Holy Days, 17 Weekly Comp.

⁷ *Lynch*, 465 U.S. at 675 n.2; 3 A. Stokes, *Church and State in the United States*, 180-93 (1950). In his 1944 Thanksgiving Day Proclamation, President Roosevelt said:
[I]t is fitting that we give thanks with special fervor to our Heavenly
Father

To the end that we may bear more earnest witness to our gratitude to
Almighty God, I suggest a nationwide reading of the Holy Scriptures
during the period from Thanksgiving Day to Christmas.
Proclamation No. 2629, 9 Fed. Reg. 13099 (1944). President Reagan and his immediate
predecessors have issued similar Proclamations. *Lynch*, 465 U.S. at 675 n.3.

Pres. Doc. 1058 (Sept. 29, 1981). See also *Lynch*, 465 U.S. at 677. On February 3, 1983, in response to a Congressional resolution, S.J. Res. 165, Pub. L. No. 97-280, 96 Stat. 1211 (1982), the President proclaimed 1983 to be the "Year of the Bible." Proclamation No. 5018, 48 Fed. Reg. 5527 (1983). Many patriotic songs, including the National Anthem, 36 U.S.C. 170, "God Bless America," the "Battle Hymn of the Republic," and "America," acknowledge God and invoke His blessings.

Such official acknowledgements of God are not limited to the federal government, of course. At least forty-five of the fifty states and the Commonwealth of Puerto Rico express gratitude to, or otherwise make reference to, a deity or Supreme Being in their constitutions.⁸ Virtually all of these state constitutions also have provisions which offer substantially the same protections against the establishment of religion as the United States Constitution.

This same tradition has been followed for 200 years in lesser ceremonies all across this nation, including school graduation ceremonies. For example, at least as early as May 31, 1804, at the first graduation ceremony of one of the nation's first public universities — the University of Georgia — the Reverend Mr. Marshall offered an invocation, and the Reverend Hope Hull concluded the proceedings with a prayer. A. Hull, *A Historical Sketch of the University of Georgia*, 17-19 (1894); *Augusta [Ga] Chronicle*, June 23, 1804. Indeed, the academic ceremonies of graduation, dating back before the founding of our country, are largely drawn from religious ceremonies. DuPuy, *Religion, Graduation and the First Amendment, A Threat or a Shadow*, 35 Drake L. Rev. 323, 358 (1985-1986). The classic graduation ceremony drawn from ancient rites is said to consist "primarily of an invocation, a commencement address, the awarding of earned degrees, the awarding of honorary degrees and the benediction." K. Sheard, *Academic Heraldry in America* 71 (1962) (emphasis added). In-

⁸ The Constitution of the State of Rhode Island and Providence Plantations is fairly typical in this regard. The Preamble to the Constitution provides:

We, the people of the State of Rhode Island and Providence Plantations, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and to transmit the same, unimpaired, to succeeding generations, do ordain and establish this Constitution of government.

R.I. Const. preamble.

deed, in *Stein*, Judge Milburn observed that the courts "can take judicial notice that invocations and benedictions at public school commencements have been a traditional practice since the beginning of public schools in this country." 822 F.2d at 1410 (Milburn, J., concurring).

B. Graduation invocations and benedictions are just one small part of this long and broad national tradition of ceremonial acknowledgments of religion, a tradition reflecting the simple truth that Americans "are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clausen*, 343 U.S. 306, 313 (1952). As this Court made clear in *Marsh*, 463 U.S. at 790, the validity under the Establishment Clause of the ceremonial practice at issue here must be viewed in the context of this historical tradition. See also *Lynch*, 465 U.S. at 671-78; *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086, 3121 (1989) (O'Connor, J., concurring in part and concurring in the judgment), 109 S. Ct. at 3142 (Kennedy, J., concurring in the judgment in part and dissenting in part).

In prohibiting any reference to a deity in public school graduation ceremonies, the lower courts in this case did precisely what this Court has expressly and repeatedly declined to do: construed the Establishment Clause "with a literalness that would undermine the ultimate constitutional objective as illuminated by history." *Walz v. Tax Comm'n*, 397 U.S. 664, 671 (1970). Both the court of appeals majority and the district court equated reference to a deity with endorsement of religion. Because "reference to a deity necessarily implicates religion," the courts below believed that it was a "forgone conclusion" that the "Providence School Committee ha[d] in effect endorsed religion in general by authorizing an appeal to a deity in public school graduation ceremonies." App. 25a.⁹

Given this reasoning, it is hard to see how any of the official ceremonial acknowledgements of religion discussed above, no matter how venerable or familiar, could survive under the courts' rulings in this case. Indeed, the analysis of the courts below gives point to this Court's warning in *Lynch* that "[f]ocus[ing] exclusively on the religious component of any activity [will] inevitably lead to its invalidation under the Establishment Clause." 465 U.S. at 680.

⁹ Circuit Judge Bownes, in a concurring opinion, also concluded that "it is self-evident that a prayer given by a religious person chosen by public school teachers communicates a message of government endorsement of religion." App. 10a.

This Court has unequivocally rejected such an extreme view.¹⁰ Ceremonial acknowledgments of religion that merely accommodate and respect the existing religious beliefs of the people do not constitute an endorsement of religion, nor do they have a primary purpose of advancing religion.¹¹ Justice O'Connor put it well in her concurring opinion in *Lynch*, 465 U.S. at 692-93:

[S]uch governmental "acknowledgments" of religion as legislative prayer of the type approved in *Marsh v. Chambers*, . . . government declaration of Thanksgiving as a public holiday, printing of "In God We Trust" on coins, and opening court sessions with "God Save the United States and this Honorable Court" . . . serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those

10 See, e.g., *Marsh*, 463 U.S. at 792 (legislative prayer is not a violation of the Establishment Clause; "it is simply a tolerable acknowledgment of beliefs widely held among the people of this country"); *Lynch*, 465 U.S. at 673 ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."); *Walz*, 397 U.S. at 669 ("The course of constitutional neutrality in this area cannot be absolutely straightline; rigidity could well defeat the basic purpose of these provisions"); *Zorach*, 343 U.S. at 312-314 ("we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence").

11 See *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring) (the "endorsement test does not preclude government from acknowledging religion or from taking religion into account"); *County of Allegheny*, 109 S. Ct. at 3121 (O'Connor, J., concurring in part and concurring in the judgment) ("Clearly, the government can *acknowledge* the role of religion in our society in numerous ways that do not amount to an endorsement.") (emphasis in original); 109 S. Ct. at 3135, 3138 (Kennedy, J., concurring in the judgment in part and dissenting in part) (government accommodation and acknowledgment of the role of religion and religious symbols play in our society is permitted under the Establishment Clause); *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 334-38 (1987) (accommodating religion through exemptions from broader government policies does not have an impermissible primary purpose or effect of advancing religion). See also, McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 22 (1985) ("Government respect for, and encouragement of, religion in general — in ways that do not compel religious exercise or invade the religious liberty of others — were considered appropriate and even necessary.")

practices are not understood as conveying government approval of particular religious beliefs.

The *Lynch* Court looked to the long standing national tradition of official acknowledgments of religion to uphold the inclusion of a creche in a government-sponsored Christmas season display. *Lynch*, 465 U.S. at 675-78.¹² The extreme doctrine pronounced by the courts in this case simply cannot be squared with *Lynch*.

Nor can the rulings below be squared with this Court's holding in *Marsh* that legislative prayer "is not . . . an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." 463 U.S. at 792. The courts below evaded *Marsh* by dismissing it as a narrow exception to *Lemon* for official religious practices, such as legislative prayer, that were common in 1791 and were specifically approved by the First Congress.¹³ Thus, because public education did not become part of our accepted traditions until the mid-19th century, the *Marsh* case, according to the courts below, is inapposite here.

The *Marsh* opinion itself refutes the interpretation that the courts below placed upon it. The *Marsh* majority stated: "[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress — their actions reveal their intent." 463 U.S. at 790. Thus, the fact that the First Congress itself provided for a paid chaplain to open its sessions with prayer not only reveals that the framers of the Establishment Clause likely did not intend the Clause to forbid that specific practice; it also provides broader insight into what the First Congress intended the words "an establishment of religion" to mean. See *County of Allegheny*, 109 S. Ct. at 3142 (Kennedy, J., concurring in the judgment in part and dissenting in part). In other words, the history surrounding the framing of the Establishment Clause (or any other constitu-

12 See also *Walz*, 397 U.S. 664, 677 (1978), where the Court upheld tax exemptions for churches based in part on the long history of such exemptions.

13 A similar view of *Marsh* was taken by the Eleventh Circuit in *Jager v. Douglas County School District*, 862 F.2d 824 (11th Cir.), cert. denied, 109 S. Ct. 2431 (1989). *Jager* involved an Establishment Clause challenge to invocations at public high school football games. The Eleventh Circuit struck down the practice, distinguishing *Marsh* on the ground that "invocations at school-sponsored football games were nonexistent when the Constitution was adopted." *Id.* at 829.

tional provision) has both a retail and a wholesale significance. And any interpretation of the Clause faithful to its intended meaning "must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion." *Id.*¹⁴ The contrary view advanced in this case by the courts below is on the order of saying that the Fourth Amendment does not reach electronic surveillance, that the Commerce Clause does not embrace interstate motor carriage, or that the First Amendment does not extend to the electronic media.

C. In contrast to the decisions below, the Sixth Circuit in *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1409 (6th Cir. 1987),¹⁵

14 Contrary to Judge Bownes' suggestion, App. 11a, this Court did not reach a contrary conclusion in *Edwards v. Aguillard*, 482 U.S. 583 n.4. After noting that legislative prayer was upheld in *Marsh* on the basis of "historical acceptance of the practice," the *Edwards* Court stated: "Such a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted." *Id.* This observation means only that because public education did not exist at the time of the Founding, there can be no historical acceptance of a practice relating to public education that would support the constitutionality of the practice. The observation in *Edwards* surely does not stand for the remarkable proposition that the constitutional history surrounding practices common in 1791 is without significance to the resolution of constitutional challenges to closely analogous innovations in 1991.

In addition, it seems doubtful that the courts below would find that the historical circumstances surrounding the framing of the Establishment Clause limit the practices prohibited by the Clause in the same manner that the courts below believe those historical circumstances to limit the practices permitted under the Clause. In other words, the courts below no doubt would agree that the First Amendment prohibits modern methods of establishing a religion no less than it prohibits ancient ones.

15 The conflict in the lower courts on the validity of graduation invocations and benedictions is not limited to *Stein* and the instant case. A number of other federal and state courts have considered the issue, and their conclusions have been mixed. Cases upholding graduation invocations and similar practices are: *Grossberg v. Deusebio*, 380 F. Supp. 285, 289 (E.D. Va. 1974); *Wood v. Mt. Lebanon Township School Dist.*, 342 F. Supp. 1293, 1294-1295 (W.D. Pa. 1972); *Wiest v. Mt. Lebanon School Dist.*, 457 Pa. 166, 320 A.2d 362, 365-366, *cert. denied*, 419 U.S. 967 (1974); *Sands v. Morongo Unified School Dist.*, 262 Cal. Rptr. 452, 459 (Cal. App.), *review granted*, 264 Cal. Rptr. 683 (Cal. 1989). See also *Florey v. Sioux Falls School Dist.*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980) (upholding school board rules outlining school activities during Christmas assemblies); *Brandon v. Board of Ed.*, 635 F.2d 971, 979 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), *reh'g denied*, 455 U.S. 983 (1982) ("where a clergyman briefly appears at a yearly high school graduation ceremony, no image of official state approval is created"); *Bogen v. Doty*, 598 F.2d 1110, 1111 (8th Cir. 1979) (upholding invocations at meetings of county board); *Lincoln v. Page*, 109 N.H. 30, 241 A.2d 799 (1968) (upholding invocations at town meetings)

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relied upon *Marsh* in upholding nondenominational¹⁶ invocations and benedictions at public school graduation ceremonies:

The annual graduation exercises here are analogous to the legislative and judicial sessions referred to in *Marsh* and should be governed by the same principles. The invocation and benediction at a graduation ceremony serves the "solemnizing" function described by Justice O'Connor in her concurrence in *Lynch*....¹⁷

The *Stein* court also distinguished this Court's decisions prohibiting public classroom prayer, stressing that there is "less opportunity for religious indoctrination or peer pressure" in the context of a graduation ceremony. 822 F.2d at 1409. The public nature of the graduation ceremony and the presence of parents provides the young graduates with adequate protection against any type of coercive religious influence. The *Stein* court also noted that "the graduation context does not implicate the special nature of the teacher-student relationship — a relationship that focuses on the transmission of knowledge and values by an authority figure." *Id.*

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; *Anderson v. Salt Lake City Corporation*, 475 F.2d 29, 34 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973) (upholding posting of Ten Commandments in public building saying "The wholesome neutrality guaranteed by the Establishment and Free Exercise Clauses does not dictate obliteration of all our religious traditions."); *Opinion of the Justice*, 108 N.H. 97, 228 A.2d 161 (1967) (decided that bill requiring the posting of "In God We Trust" in public school classrooms would be constitutional).

Cases invalidating graduation invocations and benedictions are: *Lundberg v. West Monona Community School Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989); *Graham v. Central Community School Dist.*, 608 F.Supp. 531 (S.D. Iowa 1985); *Doe v. Aldine Indep. School Dist.*, 563 F. Supp. 883 (S.D. Tex. 1982); *Bennett v. Livermore Unified School Dist.*, 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987); *Kay v. David Douglas School Dist.*, 79 Or. App. 384, 719 P.2d 875 (1986), *rev'd on other grounds*, 303 Or. 574, 738 P.2d 1389 (1987), *cert. denied*, 484 U.S. 1032; see also *North Carolina Civil Liberties Union v. Constangy*, No. C-C-89-438-M (W.D.N.C. Oct. 18, 1990) (judge's practice of opening daily sessions with recitation of brief prayer was unconstitutional).

16 While two members of the panel in *Stein* found the particular invocation and benediction at issue in that case to be excessively sectarian, all three judges upheld the general practice of including proper invocations and benedictions at public school graduation ceremonies.

17 Similarly, the Seventh Circuit applied *Marsh* in holding that a "prayer room" in the Illinois State Capitol building does not violate the Establishment Clause. *Van Zandt v.* Footnote continued on next page

To the *Stein* court's points we should add that graduation invocations and benedictions are but brief segments of a much longer, otherwise entirely secular ceremony. See, e.g., *Sands*, 262 Cal. Rptr. at 461, review granted, 264 Cal. Rptr. 683 (1989) (graduation invocation "was a brief and peripheral part of a ceremonial function"). In addition, school authorities do not themselves deliver these ceremonial acknowledgments of religion. They merely invite a private citizen to offer the invocation, authored by the speaker himself, just as they invite other speakers with different secular views to address the audience during the ceremony.¹⁸

In its first classroom prayer case, *Engel v. Vitale*, 370 U.S. 421 (1962) this Court recognized these distinctions:

There is of course nothing in the decision reached here that is inconsistent with the fact that . . . there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the state of New York has sponsored in this instance.

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Thompson, 839 F.2d 1215 (7th Cir. 1988). The Seventh Circuit rejected the notion that *Marsh*'s analytical reach extends no farther than "the specific practices that date back to the enactment of the Bill of Rights." *Id.* at 1219.

18 The opinions below suggested another possible way in which the state would become undesirably involved in the issue, i.e., that courts would have to undertake a detailed review of the content of graduation invocations and benedictions, if such practices were allowed, to ensure that the content was constitutionally permissible. App. 12, 27a. But courts would need to conduct only a minimal review of content to ensure that it did not involve proselytization or disparagement of any religious view. As the Court said in *Marsh*

The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

463 U.S. at 794-795. This minimal review of content is indeed no different from the required examination of the challenged practice in any Establishment Clause case to ensure that the practice does not have the primary purpose or effect of advancing or endorsing religion. In any event, the lower court's standard applied in this case by the courts below also requires a content-based examination of the invocations and benedictions to determine if the deity is referenced.

19 The Court in *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963) similarly affirmed ceremonial acknowledgments, stating

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370 U.S. at 435 n.21.¹⁹

For these reasons, graduation invocations and benedictions cannot sensibly be perceived as a real threat to the fundamental values protected by the First Amendment.²⁰ Certainly, these traditional ceremonial practices pose no greater threat to Establishment Clause values than do legislative invocations, upheld in *Marsh*; or spending large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools, upheld in *Board of Education v. Allen*, 392 U.S. 236 (1968); or spending public funds for transportation of students to church-sponsored schools, upheld in *Everson v. Board of Education*, 330 U.S. 1 (1947); or providing federal grants for buildings at church-sponsored colleges, upheld in *Tilton v. Richardson*, 403 U.S. 672 (1971); or providing noncategorical grants to church-sponsored colleges and universities, upheld in *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); or granting tax exemptions for church properties, upheld in *Walz, supra*; or enforcing Sunday Closing Laws, upheld in *McGowan v. Maryland*, 366 U.S. 420 (1961); or adopting a release time program, upheld in *Zorach, supra*. See *Lynch*, 465 U.S. at 681-682; *Marsh*, 463 U.S. at 791.

In sum, the references to the deity uttered by Rabbi Gutterman did not pose any real threat of establishing an official religion in Providence, Rhode Island. It is by no means far-fetched, however, that the decision of the courts below, requiring that school officials take care to exclude all references to a deity future graduation ceremonies, will send a message of official hostility toward religion. As Justice O'Connor said in *County of Allegheny*, 109 S. Ct. at 3117: "The Court has avoided drawing lines which entirely sweep away all government recognition and acknowledgement of the role

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This background [of the Founding Father's religious devotion] is evidenced today in our public life through the continuance in our oaths of office from the Presidency to the Alderman of the final supplication, "So help me God." Likewise each House of the Congress provides through its Chaplain an opening prayer, and the sessions of this Court are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God.

374 U.S. at 213.

20 See *Marsh*, 463 U.S. at 791, 795; *Lynch*, 465 U.S. at 686 ("Any notion that these symbols pose a real danger of establishment of a state church is far-fetched indeed."); *Grossberg*, 380 F. Supp. at 289.

of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion."

II The Establishment Clause Is Not Violated Absent Direct or Indirect Government Coercion On Nonadherents' Religious Freedom

As discussed in Part I, this case is distinguishable from the Court's classroom prayer cases primarily by the absence here of any government coercion, even indirect, on those present at the graduation ceremony to conform on matters of faith. The instant case thus raises a larger issue in Establishment Clause jurisprudence, one that has recently received considerable judicial and scholarly attention: whether direct or indirect government coercion is a necessary element of an Establishment Clause violation. We submit that it is, and that this Court's adoption of such a standard would go far toward rationalizing an Establishment Clause jurisprudence that, respectfully, has yielded manifest inconsistency in judicial decisions and has thus caused great uncertainty among those who must conform their conduct to the sacred demands of the First Amendment.

First, and most important, a rule that looks to whether the challenged policy actually serves as an inducement or barrier, whether crude or subtle, to individual religious choice best comports with the fundamental purpose and original understanding of the Establishment Clause. There is a strong consensus that the basic goal of the Establishment Clause is to prohibit "government from making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring).²¹ Since the Establishment Clause is thus concerned with the standing of nonadherents, it is difficult to understand how it is violated absent a cognizable effect on the nonadherent's freedom to follow the dictates of his own conscience. It would seem, rather, that Establishment Clause values are infringed only by governmental actions that somehow induce the nonadherent's religious conformity, either by burdening nonreligious conduct or by rewarding religious conduct. See

21 See also *Waltz*, 397 U.S. at 672 ("[e]ach value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so"); *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961) (plurality opinion); *Jaffree*, 472 U.S. at 68 (O'Connor, J., concurring) ("[a]lthough a distinct jurisprudence has enveloped each of [the Religion] Clauses, their common purpose is to secure religious liberty"); *County of Allegheny*, 109 S. Ct. at 3135 (Kennedy, J., concurring in the judgment in part and dissenting in part).

County of Allegheny, 109 S. Ct. at 3135-3137 (Kennedy, J., concurring in the judgment in part and dissenting in part). It would also seem that governmental speech, as opposed to financial aid or regulation, would normally not constitute such an impermissible inducement or barrier.²² To be sure, it is certainly possible for government speech to coerce,²³ and the government's purpose might well be relevant to whether its speech did in fact become coercive. The constitutional touchstone, however, should be whether the governmental practice did indeed have a coercive effect on the nonadherent, rather than whether the government was motivated by a desire to send a message of "endorsement" or otherwise evince "approval" of religion.

Recent judicial and scholarly examinations of the history surrounding the framing of the First Amendment strongly support the conclusion that some element of coercing or limiting religious choice was viewed by the Framers as necessary to a finding of unconstitutional establishment. See also *County of Allegheny*, 109 S. Ct. at 3135-3138 (Kennedy, J., concurring in the judgment in part and dissenting in part); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 135-137 (7th Cir. 1987) (Easterbrook, J., dissenting); McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986).

For example, when introducing the Establishment Clause in the First Congress, James Madison stated that he "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in a manner contrary to their conscience." 1 *Annals of Congress* 730 (J. Gales ed. 1834) (Aug. 15, 1789). He further stated that the Clause addressed the fear that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* at 731. And in his famous *Memorial and Remonstrance Against Religious Assessments*, Madison said that the proposed tax for Christian teachers in Virginia was an impermissible establishment because "compulsive support"

22 Governmental speech, even that which is quite intimidating and perjorative, is extremely unlikely to create a constitutionally cognizable burden on private expressive activities. See, e.g., *Meese v. Keene*, 481 U.S. 465, 480 (1987) (labeling of foreign films as "political propaganda" places "no burden on protected expression").

23 See *County of Allegheny*, 109 S. Ct. at 3137 (Kennedy, J., concurring in the judgment in part and dissenting in part); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 134 (7th Cir. 1987) (Easterbrook, J., dissenting).

of religion is "unnecessary and unwarrantable." Madison, *A Memorial and Remonstrance Against Religious Assessments* (June 20, 1785) ¶ 4. Similarly, Thomas Jefferson's *Virginia Bill for Religious Liberty* provided in part: "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief." 12 Hening, *Statutes of Virginia* 84 (1823) (quoted in *Everson*, 333 U.S. at 13).

Moreover, coercion is a much more workable and certain standard to guide Establishment Clause analysis. Examination of the motives of governmental bodies and determining whether the "message" received by objective observers is impermissible "approval" or permissible celebrations of "religious pluralism" necessarily involves a large element of subjectivity and requires serious inquiry into such minutiae as whether nonbelievers would be less offended "were the creche five feet closer to the jumbo candy cane." *American Jewish Congress*, 827 F.2d at 130 (Easterbrook, J., dissenting). A constitutional doctrine that conclusively presumes that governmental speech "approving" or "endorsing" religion inexorably alienates nonbelievers has the clear potential for invalidating numerous long-accepted and familiar traditions. And such an approach condemns the Court to enmesh itself in inherently fact-bound, exquisite determinations concerning whether certain practices are more akin to, for example, legislative prayer or a creche in city hall, and it inevitably yields the palpable inconsistencies that have characterized the Court's Establishment Clause jurisprudence.²⁴

Further, noncoercive religious speech is, almost by definition, innocuous to all but the most intolerant of nonadherents. Holding such practices unconstitutional not only trivializes and confuses analysis under the Religion Clauses, it affirmatively undermines the purposes of those First Amendment provisions. For unyielding judicial extirpation of all official acknowledgments that could be perceived as evincing "approval" of religion would plainly send a message of disapproval, and thus would skew public speech by "preferring those who believe in no religion over those who do believe." *Zorach*, 443 U.S. at 314 (1952).

²⁴ See, e.g., *Waltz*, 397 U.S. at 668; *Jaffree*, 472 U.S. at 68-69 (O'Connor, J., concurring); *id.* at 107-11 (Rehnquist, J., dissenting); *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890, 903 (1989) (opinion of Brennan, J.); *id.* at 905-906 (opinion of Blackmun, J.).

We do not mean to suggest that a coercion standard would obviate all line drawing or hard cases; detecting the presence of subtle, indirect coercion can be difficult. It will, however, help focus the Court's attention on practices that pose some realistic threat to Establishment Clause values and thus will eliminate a host of cases that do not warrant judicial attention. The *true* distinction between Thanksgiving Proclamations and classroom prayer is neither the nature of the religious purpose nor the "message" sent to nonbelievers concerning the government's attitude towards religion. It is, rather, the difference in the coercive effect of these practices on nonbelievers. Establishment Clause jurisprudence should thus be concerned with this genuinely distinguishing factor.

As noted earlier, the invocation and benediction struck down in this case as an establishment of religion pose none of the dangers of coercion that the Court has found in the classroom prayer cases and in the other cases invalidating official religious indoctrination.²⁵ It is simply difficult to

²⁵ *Engel*, a case involving obvious "indirect" coercion, stated only that the Establishment Clause "does not depend upon any showing of *direct* governmental compulsion and is violated . . . whether [the challenged practices] operate *directly* to coerce nonobserving individuals or not." 370 U.S. at 430 (emphasis added). Similar indirect coercion was also present in *Stone v. Graham*, 449 U.S. 39, 42 (1980), where the Court found that impressionable school children's daily exposure to the Ten Commandments posted on the classroom wall would tend to "induce the schoolchildren to read, meditate upon, perhaps to venerate and obey" these sectarian commands. Other cases suggesting that coercion is not a necessary element of an Establishment Clause violation have involved the provision of taxpayer dollars or similar governmental support to religion. See, e.g., *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985); *Committee For Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973). Finally, the Court has indicated on a number of occasions that compulsion or coercion of nonbelievers is the essence of an establishment of religion. See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 441 (1961); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (the Religion Clauses "forestall[] compulsion by law of the acceptance of any creed or the practice of any form of worship"); *Everson*, 330 U.S. at 15-16; *Braunfeld*, 366 U.S. at 606 ("To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e. legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature."); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) ("unyielding" preference for Sabbath Observers required fellow employees to "'conform their conduct to [others'] religious necessities.'") (quoting *Ottens v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)); *Jaffree*, 472 U.S. at 81 (O'Connor, J., concurring in the judgment) ("Presidential Proclamations are distinguishable from school prayer in that they are received in a noncoercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination"). Cf. *Bowen v. Roy*, 476 U.S. 693, 699 (1986) (Free Exercise Clause Footnote continued on next page

believe that Mr. Weisman or his daughter felt inhibited in their religious choices — or in any way alienated from the political community — because Rabbi Gutterman made reference to God. Accordingly, while the graduation invocations and benedictions at issue here are not, for the reasons discussed in Part I above, unconstitutional “endorsements” of religion, we nonetheless believe that the Court should examine the question whether some form of official coercion is a necessary element of an Establishment Clause violation and should reverse the courts below on the basis that it is.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this petition for a writ of certiorari to the United States Court of Appeals for the First Circuit be granted and the case set for plenary review.

Respectfully submitted,

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December 21, 1990

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“affords an individual protection from certain forms of governmental compulsion; it does not afford an individual the right to dictate the conduct of the Government’s internal procedures”). We recognize, of course, that the coercion test we advocate is in obvious, perhaps irreconcilable, tension with the result and some of the opinions in *County of Allegheny*.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 90-1151

DANIEL WEISMAN, ETC.,
Plaintiff, Appellee,

v.

ROBERT E. LEE, ET AL.,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND [Hon. Francis J. Boyle, U.S. District Judge]

Before

Campbell, *Circuit Judge,*
Bownes, *Senior Circuit Judge,*
Torruella, *Circuit Judge.*

Joseph A. Rotella, was on brief for appellants.

*Sandra A. Blanding, with whom Revins, Blanding, Revins & St. Pierre,
was on brief for appellee.*

JULY 23, 1990

TORRUELLA, *Circuit Judge*. This is an appeal from the United States District Court for the District of Rhode Island. The issue presented for review is whether a benediction invoking a deity delivered by a member of the clergy at an annual public school graduation violates the Establishment Clause of the First Amendment of the Constitution as construed by the Supreme Court under the second prong of the *Lemon* test. See *Lemon v. Kurtzman*, 482 U.S. 602, 612-13 (1971). The district court held that it did. 728 F. Supp. 68 (D.R.I. 1990).

We are in agreement with the sound and pellucid opinion of the district court and see no reason to elaborate further.

Affirmed.

Concurrence over

BOWNES, *Senior Circuit Judge* (concurring). Although the district court wrote a very good opinion, which I join in affirming, I am compelled to make some additional comments of my own because of the significance of this case and the strong emotions that it and other Establishment Clause cases generate.¹

Over three hundred and fifty years ago, Roger Williams was banished from the Massachusetts Bay Colony for, among other "heresies," arguing that the civil government should be completely separate from religion.² He travelled south and founded what became the state of Rhode Island, which was the first colony to require the separation of church and state.³ Since that time the people of Rhode Island have been sporadically involved in probing the permissible intersections between religion and government. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (deciding *Robinson v. DiCenso*). Once again this volatile and troublesome issue is before us.

We are asked to determine whether the Establishment Clause prohibits public prayer at a public middle school⁴ graduation ceremony. Broadly, this

¹ I am troubled by a report in The Boston Globe that officials at a school in Rhode Island have intentionally violated Judge Boyle's ruling by having a prayer at a graduation. Boston Globe, June 10, 1990 at 67. This blatant disregard for the law drew "howls of approval[,] applause, and cheers" at the graduation. Similar disobedience of the law has followed decisions in other recent prayer cases. See N.Y. Times, Sept. 2, 1989 at 1 (*Football Prayer Ban stirring Anger in South*) (disobedience of *Jager v. Douglas County School District*, 862 F.2d 824 (11th Cir. 1989)).

I point out that there is formidable religious authority condemning prayer in public:

And when thou prayest, thou shall not be as the hypocrites are: for they love to pray standing in the synagogues and in the corners of the streets, that they may be seen of men . . . when thou prayest, enter in to thy closet, and when thou has shut the door, pray to thy Father in secret. But when ye pray, use not vain repetitions, as the heathen do: for they think they shall be heard for their much speaking.

Matthew 6: 5-7 (King James).

² A contributing factor in his exile was his controversial interpretation of the Bible, which was the political as well as religious guide for the Puritans. Similarly, this case raises the subsidiary question of how to read the Constitution.

³ Charter of Rhode Island and Providence Plantations, July 8, 1663, reprinted in *Sources of Our Liberties*, 162 (R. Perry ed. 1978).

⁴ A middle school, as the name implies, is the school that children attend after grade school and before high school.

requires us to examine the text of the Constitution and interpret its meaning based on the various tools of constitutional analysis. In its narrowest aspect, we must examine Supreme Court Establishment Clause precedent to determine whether a prayer at a middle school graduation ceremony is similar enough to prayer in the classroom to be controlled by the Court's cases prohibiting school prayer. *Wallace v. Jaffree*, 472 U.S. 23 (1985) (daily moment of silence expressly for prayer); *Stone v. Graham*, 449 U.S. 39 (1980) (posting of ten commandments in school rooms); *Abington School District v. Schempp*, 374 U.S. 203 (1963) (daily Bible reading); *Engel v. Vitale*, 370 U.S. 421 (1962) (daily prayer). Appellants claim that a graduation benediction is more like the legislative prayer approved in *Marsh v. Chambers*, 463 U.S. 783 (1983), and therefore the school prayer cases are not controlling.

1. THE TEXT OF THE CONSTITUTION.

I begin my discussion with an examination of the text of the Constitution. Unlike earlier political documents, such as the Declaration of Independence,⁵ the Constitution is completely secular, neither invoking nor referring to "God" or any deity.⁶ The First Amendment prohibits "laws respecting the establishment of religion." U.S. Const. amend. I.⁷

The scope of that prohibition has proven extremely difficult to delineate and implement in contemporary society. The words of the Amendment give

⁵ *Amicus Curie* National Legal Foundation would have us read the religious imagery of the Declaration into the Constitution. There is no justification for such a reading. The omission of a reference to a Deity in the Constitution was not inadvertent; nor did it remain unnoticed. *Marsh*, 463 U.S. at 897 (Brennan, J., dissenting) (quoting Pfeffer, *The Deity in American Constitutional History*, 23 J. Church & State 215, 217 (1981)). In fact, it is a striking affirmation of the Establishment Clause.

⁶ In the Constitution of 1787, "religion" only appears in Article VI ("no religious test shall be required").

⁷ The Amendment has been applied to the states through the Fourteenth Amendment in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The Establishment Clause was applied to the states in *Everson v. Board of Education*, 330 U.S. 1 (1947). There was a dispute over whether the Congress that passed the Fourteenth Amendment thought that it would incorporate the Bill of Rights. This dispute focused on the weight that should be given to Congress's consideration of the "Blaine Amendment" after the Fourteenth Amendment had been enacted. The Amendment would have expressly applied language similar to the First Amendment to the states. See also *Abington*, 374 U.S. 254-59 (Brennan, J., concurring) (discussing the incorporation of the Amendment). See generally, A. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 Harv. L. Rev. 939 (1951).

us some indication of its meaning. The use of the word "respecting" indicates that a broader sweep should be given to "establishment," thus prohibiting many actions that could lead to the establishment of religion. *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 3130 (1989) (Stevens, J., concurring in part, dissenting in part) (" 'Respecting' means concerning or with reference to. But it also means with respect — that is 'reverence,' 'goodwill,' Taking into account this richer meaning, the Establishment Clause, in banning laws that concern religion, especially prohibits those that pay homage to religion."); see also *Lemon*, 403 U.S. at 612; *Engel*, 370 U.S. at 436. In addition, the use of "religion" rather than "church" implies a prohibition against more than merely an established national church. See, e.g., *Everson*, 330 U.S. at 31 ("Madison could not have confused 'church' and 'religion' or 'an established church' and an establishment of 'religion.'"). Beyond these preliminary inquiries, the "plain meaning" of the text is of little help in determining results in this case, so we must turn to the interpretation and practice that has evolved throughout the past two hundred years.

In trying to create meaning from the Establishment Clause, courts and commentators have constructed various historical arguments. But historians have decidedly mixed views about what "establishment" meant to

⁸ Extensive debate surrounds what exactly "the" framers of the Constitution meant or intended. At least three distinct major strands have been isolated, each identified with an individual: Jefferson, Williams and Madison. Jefferson focused on a "wall of separation between church and state" to protect the state from the church. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 164 (1879); Letter from Thomas Jefferson to Nehemiah Dodge and others, A Committee of the Danbury Baptist Association (Jan. 1, 1802) reprinted in 5 P. Kurland, *The Founders' Constitution* 96 (1987); see also *Everson*, 330 U.S. at 28; But cf. *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting) ("The Establishment Clause has been expressly freighted of Jefferson's misleading metaphor for nearly 40 years He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the religion clauses of the First Amendment."). Williams thought that a "hedge or wall of separation [should exist] between the garden of the church and the wilderness of the world" in order to protect religion from the corruption of the world. See generally, P. Miller, *Roger Williams: His Contribution to the American Tradition* 99 (1953). Madison's view was that competition among sects both religious and political was in everyone's best interest. Justice Rehnquist has tried to distinguish between Madison "as an advocate of sensible legislative compromise and not as an advocate of incorporating the Virginia Statute of Religious Liberty" to support the proposition that Madison believed the single intent of the amendment was to prevent the establishment of a national church (such as the Church of England). *Wallace*, 472 U.S. at 98 (Rehnquist, J., dissenting). This approach has been criticized. See, e.g., *Wallace*, 472 U.S. at 79 (O'Connor, J., concurring).

the framers. Judges and historians have been unable to agree about what ideas informed the writing of the Constitution⁸, what exactly occurred in the debates surrounding ratification (the specific intent of the framers),⁹ or what impact the "religious character" of various post-ratification practices should have on the meaning we give to the Constitution.¹⁰

The Court has spent considerable time considering and debating the history of the religion clauses, and each time the results have been inconclusive. Compare *Wallace*, 472 U.S. at 79-84 (O'Connor, J., concurring) ("The primary issue raised by Justice Rehnquist's dissent is whether the historical fact that our Presidents have long called for public prayers of thanks should be dispositive on the constitutionality of prayers in the public schools. I think not.") with *Wallace*, 472 U.S. at 91-114 (Rehnquist, J., dissenting); compare *Marsh*, 463 U.S. at 786-792 with *Marsh*, 463 U.S. at 813-817 (Brennan, J., dissenting) (discussing the extent to which the practices of the First Congress reveal the intent behind and support interpretations of the Constitution); compare *Everson*, 330 U.S. at 8-16 with *Everson*, 330 U.S. at 28-43 (Rutledge, J., dissenting); see also *Engel*, 370 U.S. at 425-30. See generally *Abington*, 374 U.S. at 232-265 (Brennan, J., concurring) (scholarly discussion of the role of the history in interpreting the Establishment Clause). It is useless to rehash this continuing debate. The ground has been trodden so much that it is barren of meaning and

⁹ Legislative history is virtually non-existent for this provision. *Marsh*, 463 U.S. at 814 (Brennan, J., dissenting). But see *County of Allegheny*, 109 S. Ct. at 3129-30 (Stevens, J., concurring in part, dissenting in part); *Wallace*, 472 U.S. at 91-100 (Rehnquist, J., dissenting).

¹⁰ Religious practice in the nineteenth century is not a persuasive argument about the meaning of the Constitution because historians have noted that the various religious practices of the government in the nineteenth century were more expansive than at the time of ratification. Christmas and Thanksgiving became national holidays at that time, for example. See generally Botein, *Religious Dimensions of the Early American State* reprinted in R. Beeman, S. Botein and E. Carter, *Beyond Confederation: Origins of the Constitution and American National Identity* 315 (1987) (discussing the increase in religious practice by the government in the nineteenth century).

¹¹ The debate about the history of the Establishment Clause highlights problems of historical theory in the Court's opinions. Historians recover "facts" and, through selecting certain facts from the universe of available facts, construct narratives that explain a historical problem. Historical interpretations are not "facts" but rather are narratives drawn from the facts selected by the historian. See generally, H. White, *Interpretation in History*, reprinted in H. White, *Tropics of Discourse* (1978); H. White, *Metahistory: The Historical Imagination in Nineteenth-Century Europe* (1973).

persuasive power. The "historical record" is inconclusive on the various cross-currents in the minds of the framers. Because of the tangled and often conflicting historical record, it is unlikely that, as an empirical matter, we can ever know the original intention of the authors of the Constitution.¹¹

Even if we could reconstruct the framers' intent, that would not necessarily be determinative in this case, given our two hundred years of experience with the Constitution and changing circumstances. See, e.g., *County of Allegheny*, 109 S. Ct. at 3099 ("Perhaps in the early days of the republic [the prohibitions of the Establishment Clause] were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism" (quotation and citation omitted)). See generally *Abington*, 374 U.S. at 232-265 (Brennan, J., concurring); T. Jefferson, *Autobiography* reprinted in *The Founders' Constitution* 85 ("The bill for establishing religious freedom . . . meant to [include] within the mantle of its protection, the Jew and the Gentile, the Christian and the Mahometan, the Hindoo and Infidel of every denomination."). An additional facet of the problem of framers' intent is what was the framers' intention about their intent. Scholars have argued that the original intention of the framers was that their intentions were irrelevant to interpreting the Constitution. See, e.g., H.J. Powell, *The Original Understanding of Original Intention*, 98 Harv. L. Rev. 885 (1985).

2. THE SCHOOL PRAYER CASES.

Although the Court may have sent confusing signals on the theoretical or historical underpinnings of the Establishment Clause, it has strictly and consistently interpreted the prohibitions of the Establishment Clause in cases involving prayer in the public schools. The Court

has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views

¹² *Wallace v. Jaffree*, 472 U.S. 23 (1985) (daily moment of silence expressly for prayer); *Stone v. Graham*, 449 U.S. 39 (1980) (posting of ten commandments in school rooms); *Abington School District v. Schempp*, 374 U.S. 203 (1963) (daily bible reading); *Engel v. Vitale*, 370 U.S. 421 (1962) (daily prayer).

that may conflict with the private beliefs of the student or his or her family.

Edwards v. Aguillard, 482 U.S. 578, 585 (1987). The Court has consistently struck down laws or practices that allow or mandate forms of prayer in the schools,¹² and it has never allowed a prayer at a formal school function. *But see Board of Education v. Mergens*, 58 U.S.L.W. 4720 (U.S. 1990) (allowing Christian club as voluntary extracurricular activity at public school).

The appellants argue that this case is not controlled by the school prayer cases because graduation attendance is voluntary, graduation sometimes takes place off-campus, and it occurs only once a year. They contend that the prayers are acceptable under either the prevailing *Lemon* test or under the exception to that standard delineated in *Marsh v. Chambers*. Such arguments have been rejected by other courts. *See, e.g., Jager v. Douglas County School District*, 862 F.2d 824 (11th Cir. 1989) (prohibiting prayer before high school football game and rejecting the use of *Marsh*), *cert. denied*, 109 S. Ct. 2431 (1989); *Graham v. Central Community School Dist.*, 608 F. Supp. 531 (D. Iowa 1985) (prohibiting prayer at high school graduation and rejecting application of *Marsh*); *see also Schempp*, 374 U.S. at 224-25 ("[T]he fact that individual students may absent themselves . . . furnishes no defense to a claim of unconstitutionality under the Establishment Clause"); *Engel*, 370 U.S. at 430 ("[T]he fact that the [prayer] on the part of students is voluntary can[not] serve to free it from the limitations of the Establishment clause.").

3. THE LEMON TEST.

In evaluating the acceptability of practices under the Establishment Clause, the Court has generally applied a derivative of the three-pronged "*Lemon*" test:

First, the [practice] must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, [it] must not foster 'an excessive government entanglement with religion.'

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citations omitted). A practice or statute that fails to meet any of these requirements violates the Establishment Clause. *See Edwards*, 482 U.S. at 483. Only one Establishment Clause case since *Lemon* has not applied some form of this test. *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987) (referring to *Marsh v.*

Chambers, 463 U.S. 783 (1983), which did not involve public schools); *see also County of Allegheny v. ACLU*, 109 S. Ct. 3086, 3100 n.4 (1989) (collecting cases that have used *Lemon* test); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 383 (1985) ("We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children.").

The district court properly and carefully applied this test and determined that the practice of invocations and benedictions at school graduations ran afoul of the second, "effect," prong of the *Lemon* test.

A. Secular Purpose

The secular purpose prong of *Lemon* requires us to determine whether the predominant purpose of the practice in question is secular. The question is not whether there is or could be any secular purpose, but rather whether the actual predominant purpose is to endorse religion. *Wallace*, 472 U.S. at 56; *see also Lynch*, 465 U.S. at 690 ("The purpose prong . . . asks whether the government's actual purpose is to endorse or disapprove of religion."). That requirement "is precisely tailored to the Establishment Clause's purpose of assuring that Government not intentionally endorse religion or religious practice." *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring). In examining the secular purpose, the Court has examined whether the stated purpose is "sincere and not a sham." *See, e.g., Edwards*, 482 U.S. at 587 (Louisiana's creation science act, although purporting to foster "academic freedom," in fact did not have a secular purpose); *Stone*, 449 U.S. at 41 ("[T]he Ten Commandments are undeniably a sacred text in the Jewish and Christian Faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.").

Although reciting a prayer before a graduation ceremony might, as appellants argue, have the residual sectarian effects of solemnizing the occasion,¹³ the primary purpose is religious. Specifically invoking the name and the blessing of "God" on the graduation ceremony is a supplica-

¹³ It is ironic that many groups that advocate prayer (or "religious liberty"), argue that prayer has no religious intent or effect. They emphasize the "solemnizing function" of an invocation or benediction at graduation and other ceremonies. Inevitably, they analogize prayer to public situations where religion is a dead letter, such as the use of "God" on coins or the "under God" language in the Pledge of Allegiance, to support their position. I am surprised that religious groups would support an argument that explicitly relegates the value of religion in our society to the merely ceremonial.

tion and thanks to "God" for the academic achievement represented by the graduation and a hope for the continuation of such good fortune. It does not serve a purely or predominantly solemnizing function. A graduation ceremony does not need a prayer to solemnize it.

B. Secular Effect

Justice O'Connor has tried to focus the secular effect discussion on the government's endorsement of religion: "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). As the district court held, it is self-evident that a prayer given by a religious person chosen by public school teachers communicates a message of government endorsement of religion.

C. Excessive Entanglement

The excessive entanglement prong prohibits actions that "may interfere with the independence of institutions." *Lynch*, 465 U.S. at 667 (O'Connor, J., concurring). In particular, this prong is concerned with the state impermissibly monitoring or overseeing religious affairs. *Marsh*, 463 U.S. at 798-99 (citing *Lemon*, 403 U.S. at 614-22). For example, the Court struck down a provision of a zoning ordinance that allowed churches "veto" power over liquor licenses within 500 feet of the church. *Larkin v. Grendel's Den*, 459 U.S. 116 (1982). Implicit in this prong, and central to any understanding of the First Amendment, is the belief that the government should not become involved with the determination of religious practice.

Although neither party strongly advances arguments on this prong, I am struck by the instances of entanglement in this case. In *Jager*, the court found no entanglement problem because the school did not monitor the content of the prayers or choose the speaker. *Jager*, 862 F.2d at 831. Here school officials did both. Appellants make much of the fact that the school has chosen to give a suitably non-denominational prayer because school officials distributed a pamphlet entitled "Guidelines for Civic Occasions." These guidelines suggest what kind of prayers should be written. This supervision of the content of the prayers by the school officials implicates the entanglement prong. The school is impermissibly involved in regulating the content of the prayer. In addition, unlike both *Stein* and *Jager*, school teachers chose the speaker who gave the prayer at graduation. This has the

effect of involving those teachers in choosing among various religious groups, an activity that is surely prohibited by the Establishment Clause.

4. MARSH

Recognizing the strictness of the *Lemon* test, the appellants urge that we follow the limited exception to the application of the test delineated in *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, the Supreme Court upheld the practice of the Nebraska Legislature to begin each legislative session with a prayer. *Marsh* was based on the "unique" and specific historical argument that the framers did not find legislative prayers offensive to the Constitution because the first Congress approved of legislative prayers. *Marsh*, 463 U.S. at 791.

That history and those special circumstances are not present at middle school graduations. The Court has specifically stated that "[s]uch a historical approach is not useful in determining the proper roles of church and state in public schools, since free public schools were virtually nonexistent at the time the Constitution was adopted." *Edwards*, 482 U.S. at 583 n.4; *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 390 n.9 (1985) (the Court has "never indulged a similar assumption [to *Marsh*] with respect to prayers conducted at the opening of the school day."); see also *Jager v. Douglas County School Dist.*, 862 F.2d 824 (11th Cir. 1989) (recognizing that *Marsh* is inapplicable to school invocations); *Graham v. Central Community School*, 608 F. Supp. 531, 535 (D. Iowa) (same); but see *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987) (apparently applying *Marsh* exception in the context of school invocations/benedictions but still finding Establishment Clause violation).

A number of differences between this case and *Marsh* reinforce my view that *Marsh* is inapplicable to school prayer cases. Middle school students are at a very different stage in their development and relationship to the prayers than are state legislators. The legislators are able to debate and vote on whether and where to have prayers; students have the prayers imposed upon them. Appellants argue that because this is only a once-a-year occurrence it does not implicate the Establishment Clause the way daily prayers do. I disagree. Because graduation represents the culmination of years of schooling and is the school's final word to the students, the prayer is highlighted and takes on special significance at graduation.

The *Stein* decision does not help the appellants. In *Stein*, a Sixth Circuit panel struck down a school invocation and benediction as violating the Establishment Clause. *Stein*, 822 F.2d 1406 (6th Cir. 1987). Each judge wrote an opinion. Judge Merritt, in the court's opinion, thought that the *Marsh* exception applied to school prayer but held that the content of the prayer in question violated the Establishment Clause because it was not sufficiently non-denominational. Judge Milburn concurred in result but added that the *Lemon* test should also be applied in examining the invocations and benedictions. Judge Wellford dissented, stating that the *Lemon* test should be applied and that under that test the prayer before the court was acceptable. Such a split in the panel, particularly when the result is contrary to what the appellants seek, is not persuasive authority.

In addition, the analysis of the judges in the majority, in which they parse through the content of the prayers to determine if they are not too offensive, is troubling. The court prohibited the specific prayer because "the language says to some parents and students: we do not recognize your religious beliefs, our beliefs are superior to yours." *Stein*, 822 F.2d at 1410. But the judges imply that some prayers are denominationally neutral enough to offend no one. Such a prayer would be acceptable, under the court's view in *Stein*, under the Establishment Clause. This, I suggest, would be contrary to the teachings of the Court. See *Engel v. Vitale*, 370 U.S. 421, 430 ("[T]he fact that the prayer may be denominationally neutral . . . can [not] serve to free it from the limitations of the Establishment Clause."). Such a prayer would also be extremely difficult, if not impossible, to compose. See *Marsh*, 463 U.S. at 819-21 (Brennan, J., dissenting) (cataloguing the problems with creating a non-denominational prayer).

Judges should not be passing on the acceptability of specific passages in prayers. See, e.g., *Marsh*, 463 U.S. at 794 ("The content of the prayer is not of concern to judges."). The ruling in *Stein* invites parents and students to review prayers to determine if the content is sufficiently neutral. That creates more rather than less religious friction by encouraging individuals to debate the content of prayers.

5. THE USE OF A DEITY.

The district court made some statements in the course of its opinion that were in the same vein as the *Stein* court's discussion of non-denominational prayer. Relying on the fact that the invocation and benediction referred to a deity, the court stated that if "God" "had been left out of the benediction

. . . the Establishment Clause would not be implicated." *Weisman v. Lee*, 728 F. Supp. 68, 74 (D.R.I. 1990). This, in my opinion, is too literal and narrow an interpretation of prayer and of what is acceptable under the Constitution. The Constitution prohibits prayer in public schools and not merely references to a deity. An invocation (literally invoking the name of God over the proceedings) and a benediction (blessing the proceedings) are by their very terms prayers and religious. A benediction or invocation offends the First Amendment even if the words of the invocation or benediction are somehow manipulated so that a deity is not mentioned. See, e.g., *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982) ("[P]rayer is perhaps the quintessential religious practice for many of the world's faiths . . . [it is] an address of entreaty, supplication, praise, or thanksgiving directed toward some sacred or divine spirit, being or object."). Although I think it is probably impossible to pray without invoking a deity directly or indirectly,¹⁴ the direct reference to a deity should not be the constitutional touchstone for our analysis.

In sum, as Justice Black stated long ago,

the 'establishment of religion' clause of the First Amendment means at least this: neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion to another.

Everson, 330 U.S. at 15. By having benedictions and invocations at school graduations, the Providence School District has violated the Establishment Clause. I concur in affirming the opinion of the district court.

Dissent over.

¹⁴ Even the "Guidelines for Civic Occasions" recognize that public prayer must "remain faithful to the purposes of acknowledging divine presence and seeking blessing."

CAMPBELL, *Circuit Judge* (Dissenting). As Judge Torruella states, Chief Judge Boyle's opinion for the district court is indeed "sound and pellucid," in that it expresses well what may be the Supreme Court's ultimate view in this confused area of the law. I say "may." As indicated below, I prefer another view but am aware that the district court's position may be more in keeping with Supreme Court consensus.

I am less amenable to Judge Bownes' reasoning. His seems to me an extreme position, especially his view that a benediction would offend the First Amendment even if a deity were not even mentioned. Judge Bownes would apparently strike down the benediction suggested by the district court (which uses the same words as the challenged prayer, but omits all references to God). That version reads in part, as follows: "For the legacy of America where diversity is celebrated and the rights of minorities are protected we are thankful. . . . May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled." See *Weisman v. Lee*, 728 F. Supp. at 74-5, n.10. It is difficult to see why this would violate the Establishment Clause. The First Amendment prohibits the making of a law "respecting an establishment of religion, or prohibiting the free exercise thereof." What is there so religious about expressing thanks for diversity and for the protection of minority rights? Is Thanksgiving a forbidden rite? Must courts outlaw the public reading of Walt Whitman or Keats's "Ode on a Grecian Urn"?

These extreme views of my colleague suggest the problems that inhere in banning invocations — including those that mention a deity. By so doing we deprive people of an uplifting message that seems especially suitable for a rite of passage like a graduation, where those present wish to give deeply felt thanks. Our First Amendment jurisprudence normally protects speech rather than suppressing it. It seems anomalous to outlaw Rabbi Guterman's tolerant, benign, nonsectarian supplication — a message so entirely appropriate in that setting, and surely inoffensive to virtually all of those present.

- * Rabbi Guterman's invocation reads, in its entirety, as follows:

God of the free, Hope of the Brave:

For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

If one were to ask what are the problems of our time, they would hardly respond that our youth and their parents are being corrupted by over-exposure to noble aspirations of this character. The common complaints are that 13 year old children are selling crack; that instead of doing homework, students are watching violent TV; that the tolerant ideals mentioned by the rabbi are being rejected in favor of destructive habits of mind and character. So what good, one might ask, is accomplished by preventing an invocation like this?

The answer, of course, is that we are also concerned to preserve the separation of church and state — a fundamental tenet of our Constitution, the benefits of which are undisputed. One need only look at Lebanon, Iran, and Northern Ireland to see what evils this tenet seeks to avoid.

Yet the question remains, is it necessary — to preserve separation of church and state — to prevent benedictions and invocations of this generous, inclusive sort? There is a tradition of such remarks at public functions going back to the Founders. See *Marsh v. Chambers*, 463 U.S. 783 (1983) (sustaining prayer at opening of state legislature's session). It seems unreasonable to say that *Marsh* applies only to state legislative sessions. One would expect it to cover other public meetings. If so, it may extend to a

(footnote continued)

For the political process of America in which all its citizens may participate, for its court system where all can seek justice we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled. AMEN.

The Rabbi's benediction reads as follows:

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

The graduates now need strength and guidance for the future. Help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion. AMEN.

graduation ceremony like this. See *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987) (upholding nonsectarian prayers at a public school graduation). Chief Judge Boyle, nonetheless rejected the *Stein* and the *Marsh* analogy. He not only felt that *Marsh* was strictly limited to a legislative session, he also believed that prayer at a graduation ceremony was more analogous to prohibited school prayer than to prayer at a legislative session. He further feared church-state entanglement if courts must determine what prayers are nonsectarian enough to pass muster.

I am troubled most by Chief Judge Boyle's last point. Still, it seems reasonably simple to separate out sectarian from nonsectarian utterances. I suspect that most Americans of all persuasions — including the increasing numbers who adhere to religions or ethical systems outside the Judeo-Christian framework — find it is appropriate and meaningful for public speakers to invoke the deity not as an expression of a particular sectarian belief but as an expression of transcendent values and of the mystery and idealism so absent from much of modern culture.

I think that *Marsh* and *Stein* provide a reasonable basis for a rule allowing invocations and benedictions on public, ceremonial occasions, provided authorities have a well-defined program for ensuring, on a rotating basis, that persons representative of a wide range of beliefs and ethical systems are invited to give the invocation. The rule should make provision not only for representatives of the Judeo-Christian religions to give the invocation, but for representatives of other religions and of nonreligious ethical philosophies to do so. In some years, lay persons who do not represent any organized religion or philosophy might be asked to give a nonreligious invocation. The possibility exists, of course, that a particular audience might occasionally be exposed to a prayer redolent of a particular religious tradition, but the next year a different invocation would be given — perhaps by an agnostic. In brief, I think the First Amendment values are more richly and satisfactorily served by inclusiveness than by barring altogether a practice most people wish to have preserved.

It appears, both from the sensitivity of the delivered prayer and the nonsectarian guidelines drawn up by the Assistant Superintendent, that the Providence School Committee went some distance to ensure that different faiths were included and that prayers were nonsectarian. It may be, however, that even more needs to be done, to ensure not only that the state does not identify itself with a particular religion but with religion generally. If so, I would simply require the Committee to broaden its rules as above

suggested, and, otherwise, to continue to permit invocations and benedictions of diverse character at high school and middle school graduations.

APPENDIX B
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DANIEL WEISMAN, personally
and as next friend
of Deborah Weisman

v.

C.A. No. 89-0377B

ROBERT E. LEE, individually and as principal
of THE NATHAN BISHOP MIDDLE
SCHOOL; THOMAS MEZZANOTTE,
individually and as principal of CLASSICAL
HIGH SCHOOL; JOSEPH ALMAGNO,
individually and as Superintendent of the
Providence School Department; VINCENT
McWILLIAMS; ROBERT DeROBBIO; MARY
BATASTINI; ALBERT LEPORE;
ROOSEVELT BENTON; MARY SMITH;
ANTHONY CAPIRO; BRUCE SUNDLUN and
ROBERTO GONZALEZ, individually and as
members of the Providence School Committee

OPINION

BOYLE, Francis J., Chief Judge.

The issue presented is whether a benediction or invocation which invokes a deity delivered by clergy at an annual public school graduation ceremony violates the first amendment of the United States constitution. This Court finds that because a deity is invoked, the practice is unconstitutional under the Establishment Clause of the first amendment as construed by the United States Supreme Court.

I. FACTS¹

Each June, the Providence School Committee and Superintendent of Schools for the City of Providence sponsor graduation or promotion ceremonies in the city's public middle and high schools. The graduation ceremonies for high school students are generally held off school grounds, usually at Veterans Memorial Auditorium, which the Providence School Department rents for the occasion. Other sites have also been used. Middle school promotion ceremonies usually take place on school property, at the schools themselves.

The Providence School Committee and the Superintendent permit public school principals to include invocations and benedictions, delivered by clergy, in the graduation and promotion ceremonies. Over the past five or six years, most, but not all, of the public school graduation and promotion ceremonies have included invocations and benedictions. The practice has in fact been followed for many years.

The Assistant Superintendent of Schools has distributed to school principals a pamphlet entitled "Guidelines for Civic Occasions" as a guideline for the type of prayers to be used at the ceremonies. The pamphlet is prepared by the National Conference of Christians and Jews, a national organization with an office in Providence. The guidelines suggest methods of composing "public prayer in a pluralistic society," stressing "inclusiveness and sensitivity" in the structuring of non-sectarian prayer. The guidelines do not suggest the elimination of reference to a deity as appropriate.

Plaintiff Daniel Weisman's daughter, Deborah, was to graduate from Nathan Bishop Middle School, a public junior high school in Providence, in June of 1989. The ceremony was planned by two teachers from the school, and was to be held on the school grounds. Part of the program for that day included an invocation and benediction delivered by Rabbi Leslie Gutterman of the Temple Beth El of Providence. Four days before the ceremony was to take place, Plaintiff filed a motion for a temporary restraining order seeking to prevent the inclusion of prayer to a deity in the form of an invocation and benediction in the Providence public schools' graduation ceremonies. The day before the ceremony, this Court denied

¹ The parties have filed an agreed statement of facts.

the Plaintiff's motion, essentially because the Court was not afforded adequate time to consider the important issues of the case.

On June 20, 1989, Deborah Weisman and her family attended the graduation ceremony for Deborah's class at Bishop Middle School. The principal of the school, Robert E. Lee, had received the "Guidelines for Civic Occasions" pamphlet from the Assistant Superintendent of Schools, and provided Rabbi Gutterman with a copy of the guidelines. Mr. Lee also spoke to Rabbi Gutterman to advise him that any prayers delivered at the ceremony should be non-sectarian. Rabbi Gutterman was not told that he could not appeal to a deity.

Rabbi Gutterman began his invocation by addressing a deity in the first line of his text, and concluded with "Amen."² The benediction similarly opened with an appeal to a God, asked God's blessings, gave thanks to a Lord, and concluded with "Amen."³ The parties agree that Rabbi Gutterman's invocation and benediction were prayers.⁴

² Both the invocation and benediction are examples of elegant simplicity, thoughtful content, and sincere citizenship. The full text of Rabbi Gutterman's invocation is as follows:

God of the Free, Hope of the Brave:

For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all can seek justice we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN

³ The following is the full text of Rabbi Gutterman's benediction:

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

Deborah Weisman continues to attend public school in the city of Providence. She is now a freshman at Classical High School in Providence. Plaintiff now seeks a permanent injunction to prevent the inclusion of invocations and benedictions in the form of prayer in the promotion and graduation ceremonies of the Providence public schools. Plaintiff's amended complaint names Principal Lee, the superintendent of Providence public schools, the principal of Classical High School, and the members of the Providence School Committee as defendants.

The parties agree resolution of the case is governed by the first amendment of the United States Constitution, specifically the Establishment Clause.⁵ It is to that law that we now turn.

II. THE ESTABLISHMENT CLAUSE

"The [Supreme] Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aquilard*, 482 U.S. 578, 583-84 (1987). Since the landmark 1962 decision of *Engel v. Vitale*, 370 U.S. 421 (1962), the Supreme Court has steadfastly required that the schoolchildren of America not be compelled, coerced, or subtly pressured to engage in activities whose predominant purpose or effect was to advance one set of religious beliefs over another, or to prefer a set of religious beliefs over no religion at all. God has been ruled out of public education as an instrument of inspiration or consolation.

The graduates now need strength and guidance for the future. Help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

AMEN

⁴ Webster's Dictionary defines prayer as "a solemn and humble approach to Divinity in word or thought usu[ally] involving petition, confession, praise or thanksgiving." A benediction is defined as "the invocation of a blessing on persons or things being dedicated to God." An invocation is "a prayer of entreaty that is usu[ally] a call for the divine presence and is offered at the beginning of a meeting or service of worship." Webster's Third New International Dictionary (unabridged), G & L Merriam Co., Springfield, Massachusetts (1981).

⁵ The first amendment provides in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. Const. amend. I.

This vigilance is based upon the perceived sensitive nature of the school environment and the apprehended effect of state-led religious activity on young, impressionable minds. *Grand Rapids School District v. Ball*, 473 U.S. 373, 383 (1985); *Edwards*, 482 U.S. at 584. "Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Edwards*, 482 U.S. at 584.

Under the Establishment Clause, the Court has struck down state statutes that required a daily Bible reading before class (*Abington School District v. Schempp*, 374 U.S. 203 (1963)), or required that a copy of the Ten Commandments be posted in every classroom (*Stone V. Graham*, 449 U.S. 39 (1980)), or required the recitation of a "denominationally neutral" prayer at the beginning of the school day (*Engel v. Vitale*, 370 U.S. 421 (1962)), or statutes which authorized a daily moment of silence expressly for prayer (*Wallace v. Jaffree*, 472 U.S. 38 (1985)). In virtually all of these cases, the Court acknowledged that while "[w]e are a religious people whose institutions presuppose a Supreme Being," (*Zorach v. Clauson*, 343 U.S. 306, 313 (1952)), the Establishment Clause of the first amendment was intended to prevent a State from becoming involved in leading its citizens, however young, in appeals to or adoration of a deity.

The Supreme Court "consistently has applied the three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) to determine whether a particular state action violates the Establishment Clause of the Constitution." *Edwards*, 482 U.S. at 597 (Powell, J. concurring); *Grand Rapids School District*, 473 U.S. at 383 (1985) ("We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and

⁶ In *Everson v. Board of Education*, 330 U.S. 1 (1947), the Court summarized the Establishment Clause in these oft-repeated words:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations, or groups, and vice versa."

330 U.S. at 15-16.

religion in the education of our children"). An evaluation of the authorized practice of the Providence School Committee under the *Lemon* test is necessary, "mindful of the particular concerns that arise in the context of public elementary and secondary schools." *Edwards*, 482 U.S. at 585.

III. THE LEMON TEST

The *Lemon* test reviews governmental actions using three prongs: "First, the [practice] must have a secular . . . purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [third], the [practice] must not foster 'an excessive entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citations omitted). "State action violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards*, 482 U.S. at 583.

The second prong of the *Lemon* analysis examines whether the effect of the action violates the Establishment Clause. It is here that the invocation and benediction practice runs afoul of the first amendment. Because this Court finds that the Providence School Committee's practice fails to meet constitutional scrutiny under the second prong of the *Lemon* test, it is not necessary to discuss the first and third parts of the test.

The Second *Lemon* Prong: Principal Effect Must Neither Advance Nor Inhibit Religion

One method of determining whether a state action advances or inhibits religion is to determine whether the action creates an identification of the state with a religion, or with religion in general. "Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any — or all — religious denominations as when it attempts to inculcate specific religious doctrines." *Grand Rapids School District*, 473 U.S. at 389.

The particular circumstances of each government action are critical in the examination of the effect that any church-state identification may have on its audience. For example, in *Grand Rapids School District v. Ball*, the Court distinguished between two of its earlier precedents. In *McCullum v. Board of Education*, 333 U.S. 203 (1948), the Court held that religious instruction could not be held on public school premises as a part of the school program, even though the instruction was conducted by non-public school personnel and participation was voluntary. In *Zorach v. Clauson*, however, the Court held that a similar program that was conducted off

school premises passed constitutional scrutiny. 343 U.S. 306 (1952). As the Court explained in *Grand Rapids*, "[t]he difference in symbolic impact helps to explain the difference between the cases. The symbolic connection of church and state in the *McCullum* program presented the students with a graphic symbol of the 'concert or union or dependency' of church and state . . . This very symbolic union was conspicuously absent in the *Zorach* program." *Grand Rapids School District*, 473 U.S. at 391.

Similarly, in *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), the Court invalidated a "Shared Time" program in which a school district provided classes to nonpublic school students at public expense in classrooms located in and leased from the nonpublic schools. The Court emphasized that students attending both public and nonpublic school classes within the same building "would be unlikely to discern the crucial difference between the religious school classes and the 'public school' classes" 473 U.S. at 391. The Court pointed out that even the students who were able to recognize the difference between the two classes "would have before [them] a powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same class at some other time during the day." *Id.* at 392.

In this case, the benediction and invocation advance religion by creating an identification of school with a deity, and therefore religion. The invocation and benediction present a "symbolic union" of the state and schools with religion and religious practices. While the fact that graduation is a special occasion distinguishes this school day from all others, the uniqueness of the day could highlight the particular effect that the benediction and invocation may have on the students. The presence of clerics is not by itself determinative. It is the union of prayer, school, and important occasion that creates an identification of religion with the school function. The special nature of the graduation ceremonies underscores the identification that Providence public school students can make.⁷ "This effect — the symbolic union of government and religion in one sectarian enterprise — is an impermissible effect under the Establishment Clause." *Id.*

Closely related to the identification analysis is examination which determines whether the effect of the governmental action is to endorse one

⁷ Of course, the reverse might also be true. Students might conclude that a deity is not an important part of their lives. This Court is not permitted to ruminate concerning the aptness of this possible result as the Establishment Clause is currently construed.

religion over another, or to endorse religion in general. The response is a foregone conclusion; that is, the reference to a deity necessarily implicates religion. See *Grand Rapids School District*, 473 U.S. at 389 ("If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated"). In recent cases, the "endorsement" inquiry has come to the fore of *Lemon* analysis. *County of Allegheny v. American Civil Liberties Union*, ___ U.S. ___, 109 S.Ct. 3086, 3100 (1989). Therefore, "an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices. The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years." *Grand Rapids School District*, 473 U.S. at 390. In this case, the Providence School Committee has in effect endorsed religion in general by authorizing an appeal to a deity in public school graduation ceremonies. The invocations and benedictions convey a tacit preference for some religions, or for religion in general over no religion at all. Schoolchildren who are not members of the religions sponsored, or children whose families are non-believers, may feel as though the school and government prefer beliefs other than their own.

It is of no significance that the invocation and benediction are supposed to be nondenominational, or that participation or even recognition of the prayers is voluntary. In *Engel v. Vitale*, 370 U.S. 421 (1962), the Court invalidated a New York statute which required a short, nondenominational prayer to be recited at the beginning of each school day. "Neither the fact that the prayer may be denominationally neutral," the Court wrote, "nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment" 370 U.S. at 430.

In summary, the practice of having a benediction and invocation delivered at public school graduation ceremonies has the effect of advancing religion. The special occasion of graduation coupled with the presence of prayer creates an identification of governmental power with religious practice. Finally, the practice of including prayer may have the effect of either endorsing one religion over others, or of endorsing religion in general.

For these reasons, the practice of providing guidelines for "non-sectarian" prayer fails to withstand constitutional scrutiny.

Defendants rely heavily on *Marsh v. Chambers*, 463 U.S. 783 (1983). In that opinion, the Supreme Court upheld the Nebraska state legislature's opening of each session with a prayer led by a chaplain who was paid by the State. The Court noted that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." 463 U.S. at 786. The Court noted the long history, dating back to the Continental Congress, of opening legislative sessions with a prayer offered by a chaplain who was paid by the state. This unique "unambiguous and unbroken history" led the Court to hold that the drafters of the Constitution did not intend the first amendment to bar such legislative prayers.⁸

Defendant argues that this court should follow the reasoning of the Sixth Circuit Court of Appeals in *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), in which the court extended *Marsh* to include benediction and invocations at public school commencement ceremonies. In *Stein*, the Court of Appeals held that annual high school graduation exercises were analogous to the legislative and judicial sessions in *Marsh*. The Court of Appeals found that the invocations and benedictions at graduation provided less opportunity for religious indoctrination or peer pressure than did classroom prayer for two reasons: first, the public nature of the ceremonies and the usual presence of parents acted as a buffer from religious coercion; second, the prayers were not led by a teacher or school official, thus they

⁸ Like legislative prayer, religious involvement in American education has a long history. Beginning in colonial times, the first schools in this country were religiously motivated. See generally *Lemon v. Kurtzman*, 403 U.S. at 645 (opinion of Brennan, J.) Public school education was not begun until about 1840, nearly seventy years after the Declaration of Independence, and a half century after the adoption of the Constitution. The purpose of colonial schools was to ensure that children could read and understand the principles of Biblical faith. H.G. Good, *A History of American Education*, 40-41 (1975). Many of the charters of America's oldest colleges and universities expressly state that the institutions' purpose was to spread the Christian faith. For example, Dartmouth College was founded to "spread[] Christian knowledge among" American Indians "with a view to their carrying the gospel in their own language." Charter of Dartmouth College, (1769). The point is that at the time the Constitution was adopted, there really was no public education except that intimately connected with religious purpose. There is no factual basis for an historical argument that the first amendment was intended by the drafters to isolate religion from education.

did not implicate the teacher-student relationship. 822 F.2d at 1409. The Court of Appeals did, however, find that the particular benediction and invocation challenged in *Stein* were unacceptable under the *Marsh* holding because they contained language that was based on Christian theology and thus were not nonsectarian. *Id.* at 1410. As the Supreme Court did in *Marsh*, the *Stein* court did not apply the *Lemon* test.⁹

Stein's extension of the *Marsh* rationale is not persuasive. The *Marsh* holding was narrowly limited to the unique situation of legislative prayer. The clearest indication of this fact is that the *Marsh* decision did not use the *Lemon* test in its review of legislative benedictions. Since the *Lemon* test was first developed in 1971, every case involving the issue of prayer in school has used its analysis. *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 ("The *Lemon* test has been applied in all cases since its adoption in 1971, except in *Marsh v. Chambers*"); *Grand Rapids School District v. Ball*, 473 U.S. 373, 383 (1985) ("We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children"). *Marsh*'s unique exception to the *Lemon* test would most likely not be applied to school prayer cases, which on the basis of existing precedent requires use of the *Lemon* analysis. When the practice of the Providence School Committee is reviewed under *Lemon*, it fails to withstand Establishment Clause scrutiny, *supra*.

Extending the *Marsh* analysis to school benedictions is arguably unworkable because it results in courts reviewing the content of prayers to judicially approve what are acceptable invocations to a deity. *See Stein*, 822 F.2d at 1410 (reviewing language of invocation and benediction). What must follow is gradual judicial development of what is acceptable public prayer. This result is as contrary to the requirements of the Establishment Clause as is legislative composition of an official state prayer. *See Engel*, 370 U.S. at 425, 430.

⁹ The rationale of the *Stein* decision is far from clear precedent. The case was heard by three judges of the sixth circuit, and each judge wrote an opinion in the case. The opinion for the court adopted *Marsh*, did not apply *Lemon*, but found that language of the challenged prayers did not meet *Marsh*'s requirement of nonsectarian prayer. The concurring opinion applied not only the *Marsh* standard, but also applied the *Lemon* test and found that while commencement prayer in general survived *Lemon* scrutiny, the language of the particular prayers in the case did not. The dissenting opinion agreed with much of the two majority opinions, but argued that all commencement prayers passed the *Lemon* test, including those in the *Stein* case.

Finally, the non-sectarian guidelines used by the School Committee are not a means of rescue. They are useful in environments where prayer is permitted. Here, it is not the particular nature or wording of the prayers which implicates the first amendment — it is prayer at the ceremony which transgresses the Establishment Clause.

On every other school day, at every other school function, the Establishment Clause prohibits school-sponsored prayer. If the students cannot be led in prayer on all of those other days, prayer on graduation day is also inappropriate under the doctrine currently embraced by the Supreme Court.

It is necessary to explain what this decision does not do. First, "[n]othing in the United States Constitution as interpreted by this Court . . . prohibits public school children from voluntar[y] [private] pray[er] at any time before, during, or after the school day," or anytime during the graduation ceremonies. *Wallace v. Jaffree*, 472 U.S. 38, 67 (1985) (O'Connor, J. concurring). Second, nothing in this decision prevents a cleric of any denomination or anyone else from giving a secular inspirational message at the opening and closing of the graduation ceremonies. Counsel for plaintiff conceded at argument, as she must, that if Rabbi Gutterman had given the exact same invocation as he delivered at the Bishop Middle School on June 20, 1989 with one change — God would be left out — the Establishment Clause would not be implicated.¹⁰ The plaintiff here is contesting only an invocation or benediction which invokes a deity or praise of a God.

Finally, in the words of Justice Kennedy, "The case before [the court] illustrates better than most that the judicial power is often difficult in its

¹⁰ Rabbi Gutterman could have delivered the following benediction:

For the legacy of America where diversity is celebrated and the rights, of minorities are protected, we are thankful. May these young men and women grow up to enrich it.

For the liberty of America, we are thankful. May these new graduates grow up to guard it.

For the political process of America in which its citizens may participate, for its court system where all can seek justice we are thankful. May those we honor with morning always turn to it in trust.

For the destiny of America we are thankful. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

exercise . . . The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result." *Texas v. Johnson*, __U.S. __, 109 S.Ct. 2533, 2548 (1989) (Kennedy, J. concurring). The fact is that an unacceptably high number of citizens who are undergoing difficult times in this country are children and young people. School-sponsored prayer might provide hope to sustain them, and principles to guide them in the difficult choices they confront today. But the Constitution as the Supreme Court views it does not permit it. Choices are made in order to protect the interests of all citizens.¹¹ Unfortunately, in this instance there is no satisfactory middle ground. Neither the legislative, nor the executive, nor the judicial branch may define acceptable prayer. Those who are anti-prayer thus have been deemed the victors. That is the difficult but obligatory choice this Court makes today.

Plaintiff may prepare and present a form of judgment within ten days declaring that the inclusion of prayer in the form of invocations or benedictions at public school promotion or graduation exercises in the City of Providence is unconstitutional in violation of the first amendment and permanently enjoining the School Committee of the City of Providence, its agents or employees from authorizing or encouraging the use of prayer in connection with school graduation or promotion exercises.

¹¹ Justice Brennan described the effect of the first amendment in his opinion for the Court in *Grand Rapids School District v. Ball*:

...For just as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance. The solution to this problem adopted by the Framers and consistently recognized by this Court is jealousy to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and non-religion. Only in this way can we "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary" and "sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Grand Rapids School District, 473 U.S. at 382.

SO ORDERED,

ENTER:

Francis J. Boyle, Chief Judge
United States District Court
District of Rhode Island

January 9, 1990

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

DANIEL WEISMAN, personally
and as next friend
of DEBORAH WEISMAN

v.

C.A. No. 89-0377B

ROBERT E. LEE, individually and as principal
of THE NATHAN BISHOP MIDDLE
SCHOOL; THOMAS MEZZANOTTE,
individually and as principal of CLASSICAL
HIGH SCHOOL; JOSEPH ALMAGNO,
individually and as Superintendent of the
Providence School Department; VINCENT
McWILLIAMS; ROBERT DeROBBIO; MARY
BATASTINI; ALBERT LEPORE;
ROOSEVELT BENTON; MARY SMITH;
ANTHONY CAPIRO; BRUCE SUNDLUN and
ROBERTO GONZALEZ, individually and as
members of the Providence School Committee

JUDGMENT

1. The inclusion of prayer in the form of invocations or benedictions at public school promotion or graduation exercises in the City of Providence is unconstitutional in violation of the First Amendment of the United States Constitution.

2. The School Committee of the City of Providence, its agents or employees, are permanently restrained and enjoined from authorizing or encouraging the use of prayer in connection with school graduation or promotion exercises.

SO ORDERED,

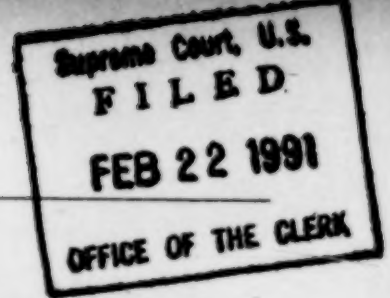
ENTER:

FRANCIS J. BOYLE, CHIEF JUDGE
United States District Court
District of Rhode Island

Dated: January 12, 1990

(WEISMAN.ORD)

②
No. 90-1014



**In the
Supreme Court of the United States**

OCTOBER TERM, 1990

ROBERT E. LEE, ET AL.,
PETITIONERS,

v.

DANIEL WEISMAN, ETC.,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

**BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

SANDRA A. BLANDING*
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Counsel for Respondent

**Counsel of Record*

February 22, 1991

QUESTION PRESENTED

Does the inclusion of invocations and benedictions in the form of prayer in the promotional ceremonies of public middle schools and in the graduation ceremonies of public high schools in the City of Providence, Rhode Island, violate the Establishment Clause of the First Amendment of the United States Constitution, applicable to the states by the Fourteenth Amendment of the United States Constitution?

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No. 90-1014

**In the
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ROBERT E. LEE, ET AL.,
PETITIONERS,
v.
DANIEL WEISMAN, ETC.,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

**BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

Respondent, Daniel Weisman, personally and as next friend of Deborah Weisman, respectfully opposes the Petition for Writ of Certiorari filed by Robert E. Lee, individually and as Principal of the Nathan Bishop Middle School; Thomas Mezzanotte, individually and as Principal of Classical High School; Joseph Almagno, individually and as Superintendent of the Providence School Department; Vincent McWilliams, Robert DeRobbio, Mary Batastini, Albert Lepore, Roosevelt Benton, Mary Smith, Anthony Caprio, Bruce Sundlun and Roberto Gonzalez, individually and as members of the Providence School Department.

STATEMENT OF THE CASE

I. Statement of Facts

This matter was submitted to the District Court on an Agreed Statement of Facts.¹

Respondent, Daniel Weisman, is the father of a child, Deborah, who attends public school in the City of Providence.² At the time this action was initiated, Deborah was an eighth grade student at Nathan Bishop Middle School.³ Various teachers at the Nathan Bishop Middle School planned the school's promotional ceremony, and suggested to the school principal that Rabbi Leslie Y. Gutterman be asked to offer an invocation and benediction at that ceremony.⁴ Rabbi Gutterman agreed, and recited the following invocation and benediction:

Invocation: God of the Free, Hope of the Brave:

For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all can seek justice we thank You. May those we honor this morning always turn to it in trust.

¹ The Agreed Statement of Facts is reprinted in its entirety as Appendix I, *supra*. For convenience, further reference to these agreed facts will be cited to the page where they appear in the appendix.

² App. I, p. A1.

³ App. I, p. A1.

⁴ App. I, p. A4.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

Amen.

Benediction: O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

The graduates now need strength and guidance for the future. Help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

Amen.

The parties agree that Rabbi Gutterman's invocation and benediction are prayers.⁵

Prior to the 1989 promotional ceremony at the Nathan Bishop Middle School, the school's principal provided to Rabbi Gutterman a pamphlet entitled "Guidelines for Civic Occasions", published by the National Conference of Christians and Jews.⁶

⁵ App. I, p. A9.

⁶ App. I, p. A4.

This pamphlet purports to explain the type of "public prayer" which should be offered during secular, civic occasions. For example, these "Guidelines" suggest "opening ascriptions" such as "Mighty God", "Our Maker", "Source of All Being", "Creator and Sustainer". The "Guidelines" also note that "general public prayer" should "remain faithful to the purposes of acknowledging divine presence and seeking blessing". The "Guidelines" were distributed to all of the principals of Providence public schools by an assistant superintendent as a recommendation for the type of prayer which should be offered at the schools' respective promotional or graduation ceremony.⁷ In addition, prior to the 1989 promotional ceremony for Nathan Bishop Middle School, the school's principal instructed Rabbi Guterman personally that the prayers he delivered at the ceremony should be non-sectarian.⁸

Throughout the City of Providence, promotional ceremonies are annually conducted at each of the City's middle schools, as are graduation ceremonies at each of the City's high schools.⁹ The middle school ceremonies are usually conducted on school premises; the high school ceremonies are usually conducted in facilities which the school department rents for the occasion, using tax funds.¹⁰ Petitioners supervise and authorize the content of these ceremonies, and have specifically authorized the principals of the various public schools to include in their respective promotional or graduation ceremonies invocations and benedictions in the form of prayer, delivered by clergy.¹¹ The clergy are chosen by agents of the petitioners.¹²

⁷ App. I, p. A3.

⁸ App. I, p. A4.

⁹ App. I, p. A3.

¹⁰ App. I, p. A8.

¹¹ App. I, p. A3.

¹² App. I, p. A9.

The practice of including prayer at public middle school promotional ceremonies and at public high school graduation ceremonies in the City of Providence has not been uniformly followed. During the school years 1985 through 1989, four of the City's public middle schools annually held promotional ceremonies which did not include prayer.¹³ During the same time period, one of the City's high schools annually held a graduation ceremony which did not include prayer.¹⁴ In those schools that did include prayer in their respective ceremonies, the schools each produced and distributed programs which identified, by name and church affiliation, the clergy offering the invocation and benediction.¹⁵

Respondent Daniel Weisman's daughter Deborah now attends a public high school in the City of Providence whose graduation ceremonies have, in the past, included invocations and benedictions in the form of prayer.¹⁶ Daniel Weisman practices Judaism.¹⁷ He is opposed to and offended by the inclusion of prayer in public school promotional and graduation ceremonies.¹⁸ He is further opposed, as a taxpayer, to the expenditure of tax funds for school ceremonies which include prayer.¹⁹

II. The Decision of the District Court

Respondent Daniel Weisman brought this lawsuit in June, 1989, to obtain declaratory and injunctive relief preventing Petitioners from continuing their practice of including invoca-

¹³ App. I, p. A7.

¹⁴ App. I, pp. A7-A8.

¹⁵ App. I, pp. A4-A7.

¹⁶ App. I, pp. A1, A5.

¹⁷ App. I, p. A10.

¹⁸ App. I, p. A9.

¹⁹ App. I, p. A10.

tions and benedictions in the form of prayer in the City of Providence's public school promotional and graduation ceremonies. The District Court denied Mr. Weisman's Motion for a Temporary Restraining Order on the ground that the Court was not afforded adequate time to consider the issues presented. Subsequently, the parties presented the case to the trial judge upon an Agreed Statement of Facts.

The District Court analyzed the facts before it under the three-pronged test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), with appreciation of "the particular concerns that arise in the context of public elementary and secondary schools".²⁰ Because the Court found that the challenged practice fails the second prong of the *Lemon* test, its analysis is limited to the effect of Petitioners' practice and does not reach issues of purpose or entanglement.

The District Court held that under the facts before it, "the benediction and invocation advance religion by creating an identification of school with a deity, and therefore religion."²¹ The fact that the challenged prayers were offered at graduation ceremonies heightens the prohibited effect. "It is the union of prayer, school, and important occasion that creates an identification of religion with a school function. The special nature of the graduation ceremonies underscores the identification that Providence public school students can make."²² The Court then proceeded to evaluate whether or not the identification of school with religion conveyed a message of government endorsement of a particular religion or of religion generally.

²⁰ The District Court's decision is reprinted in the Petition for Certiorari as Appendix B. Further reference to this decision will be cited to the page on which the reference appears in the Appendix to the Petition. App. B, p. 23a, citing *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987).

²¹ Petition, App. B, p. 24a.

²² Petition, App. B, p. 24a.

The Court concluded that Petitioners' practice did convey such a message.²³

The District Court also took care to consider the applicability of *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), to the facts before it, and rejected the reasoning of both cases as inapposite here. In addressing the rationale of *Marsh*, the District Court noted that unlike legislative prayer, "[p]ublic school education was not begun until about 1840 . . . a half century after the adoption of the Constitution."²⁴ The District Court also noted that while *Marsh* did not employ the *Lemon* test, every United States Supreme Court case since 1971 which deals with school prayer, including two cases decided subsequent to *Marsh*, has relied on a *Lemon* analysis. *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987); *Grand Rapids School District v. Ball*, 473 U.S. 373, 383 (1985). Furthermore, the District Court held, "[e]xtending the *Marsh* analysis to school benedictions is arguably unworkable because it results in courts reviewing the content of prayers to judicially approve what are acceptable invocations to a deity . . . What must follow is a gradual judicial development of what is acceptable public prayer."²⁵ Because *Stein* relied on *Marsh* in a public school setting, the District Court found it unpersuasive and declined to follow its approach.²⁶

III. The Decision of the Court of Appeals

The United States Court of Appeals for the First Circuit affirmed the District Court's decision, with Judge Campbell

²³ Petition, App. B, p. 25a.

²⁴ Petition, App. B, p. 26a n.8.

²⁵ Petition, App. B, p. 27a (citations omitted).

²⁶ In addition, the District Court noted that because of the lack of consistency in the separate decisions of the judges deciding *Stein*, its value as precedent is unclear.

dissenting.²⁷ The majority opinion simply adopts the reasoning of the lower court; however, Judge Bownes also wrote a concurring opinion which elaborates on the purpose and entanglement prongs of the *Lemon* test, not addressed below.²⁸ Judge Bownes found that the primary purpose of prayer at a graduation ceremony is religious and that "a prayer given by a religious person chosen by public school teachers communicates a message of government endorsement of religion."²⁹ He further noted that the specific facts of this case raise entanglement concerns, because not only do school teachers choose speakers among various religious groups, but school officials have engaged in supervising and regulating the content of the prayers offered by clergy.³⁰ These elements of entanglement were not present either in *Stein* or in *Jager v. Douglas County School District*, 862 F.2d 824 (11th Cir.), *cert. den.*, 490 U.S. 1090 (1989).³¹

It is worthy of note that although Judge Campbell wrote a dissenting opinion, he begins by agreeing that the District Court's opinion "may be more in keeping with Supreme Court consensus" than is the view which he "prefers".³² Judge Campbell then proceeds to argue, not that the District Court's reasoning, adopted by the majority consensus, conflicts with Supreme Court precedent, but rather that a *new rule* should be adopted in the future. The rule which he conceptualizes provides for the allowance of invocations and benedictions at ceremonial occasions, provided that speakers are rotated among "representatives of the Judeo-Christian religions . . .

²⁷ This decision is reprinted in the Petition for Certiorari as Appendix A. Further reference to this decision will be cited to the page on which the reference appears in the Appendix to the Petition.

²⁸ Petition, App. A, pp. 2a, 9a-11a.

²⁹ Petition, App. A, pp. 9a-10a.

³⁰ Petition, App. A, p. 10a.

³¹ Petition, App. A, p. 10a.

³² Petition, App. A, p. 14a.

representatives of other religions and of nonreligious ethical philosophies."³³ Judge Campbell does not attempt to reconcile the specific facts of this case with present Establishment Clause analysis. Indeed, in referring to the challenged practice, he notes "[i]t may be, however, that even more needs to be done, to insure not only that the state does not identify itself with a particular religion but with religion generally."³⁴

REASONS FOR DENYING THE PETITION

I. The decision of the First Circuit Court of Appeals, under the facts of this case, comports with the established precedent and raises no novel or unsettled questions of law.

Despite the sweeping characterizations made by Petitioners, this case does nothing more than follow well established precedent of this Court which prohibits our public schools from becoming a vehicle either to foster or discourage a particular set of religious beliefs or religion generally. The First Circuit's decision has no impact on public ceremonies generally, upon activities in colleges or universities, or upon official acknowledgements of a deity outside of a public school setting. Rather, the Court's decision focused, as it must, upon the specific facts before it, facts which were agreed upon by both parties.

There is little which is remarkable in the Court's determination that the practice of authorizing prayer by a religious person, chosen by public school officials who monitor the content of the prayer offered, to eighth grade and twelfth grade public school students at a major school event violates the Establishment Clause. This Court has repeatedly and consistently ad-

³³ Petition, App. A, p. 16a.

³⁴ Petition, App. A, p. 16a.

addressed the issues presented to the First Circuit in this case, and has repeatedly and consistently held that the Establishment Clause must be applied with special vigilance in a public school setting. *Edwards v. Aguillard*, 482 U.S. 578, 583-4; *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985). Petitioners attempt to create a novel issue of law by asking this Court to rule that the Establishment Clause requires proof of coercion. The issue raised by Petitioners, however, is more discredited than novel. In particular, this Court has never accepted the proposition that allowing public school children to absent themselves from attending school sponsored prayer is sufficient to cure an Establishment Clause violation.³⁵ *Wallace v. Jaffree*, 472 U.S. 38 (1985); *School District of Abington Township v. Schempp*, 374 U.S. 203, 224-225, 228 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). Moreover, this Court could not mandate an inquiry into coercion on the facts of this case without inviting relitigation of virtually every school prayer case decided by the Court during the past thirty years. Such a wholesale re-examination of Establishment Clause jurisprudence is both unnecessary and unwise. Finally, tradition alone has never been sufficient to validate a practice which violates the Establishment Clause, especially when it is as inconsistent as the tradition revealed by this record.³⁶ *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

The decision of the First Circuit encompasses no novel or unsettled questions which should be resolved by this Court. Rather, it is limited, as it must be, to the specific facts of this

³⁵ The fact that Providence's eighth and twelfth grade students are not required to attend their respective promotional or graduation ceremonies is no more persuasive constitutionally than have been past attempts to render school prayer "voluntary".

³⁶ In any event, the facts in this case do not support an argument founded in tradition, for the parties agree that the practice of including prayer in promotional or graduation ceremonies within Providence's public schools is not uniform. Several schools routinely do *not* follow this practice.

case and to a determination, under an appropriate and correct evaluation of *Lemon*, that Petitioners' practice of authorizing clergy to offer prayers at a public school function creates an "identification of school with . . . religion," with the effect of conveying a message of endorsement of religion.³⁷ *Grand Rapids School District v. Ball*, 473 U.S. 373, 383 (1985). The First Circuit's determination that a practice which creates a perception that public school officials endorse particular religious beliefs, or religion generally, is clearly violative of the Establishment Clause, embarks upon no untested or subtle analysis of Constitutional principles.³⁸

II. The decision of the First Circuit does not present a conflict requiring review and resolution by this Court.

A. The decision of the First Circuit is reconcilable with other Courts' of Appeals decisions when analyzed under current precedent of this Court.

Contrary to Petitioners' allegations, the proclaimed conflict among the Courts of Appeals as to the unconstitutionality of prayer at public school events is more illusory than real when the cases are carefully analyzed in light of current Supreme Court precedent. In addition to the decision of the First Circuit Court of Appeals in the instant case, three Courts of Appeals have addressed the issue of prayer at extra-curricular public school events. In *Collins v. Chandler Unified School District*, 644 F.2d 759 (9th Cir. 1981), the Ninth Circuit Court of Appeals held that student-led opening prayers at high school

³⁷ Petition, App. B, pp. 24a-25a.

³⁸ Petitioners mischaracterize the practice of inviting clergy to offer prayer at school functions as constitutionally acceptable acknowledgement of religion. In reality, they seek an accommodation of religious practices, which is inappropriate when the Free Exercise Clause is not implicated. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 at n.59 (1989).

assemblies which students were not required to attend violates the Establishment Clause. Applying the *Lemon* test, the Court found that the invocation of assemblies with prayer served no secular purpose and had the impermissible effect of placing the state's imprimatur on religious activity. Furthermore, the Court noted that although attendance at assemblies was voluntary, the student who objected to the prayers was forced to choose between foregoing an important school activity, albeit social in nature, or attending in violation of his or her personal beliefs. To call such a decision voluntary is a misnomer. Indeed, the Court itself labeled these circumstances inherently coercive.

The Eleventh Circuit Court of Appeals similarly held that invocations in the form of prayer, delivered by students, parents, or school employees prior to public high school football games, violates the Establishment Clause. *Jager v. Douglas County School District*, 862 F.2d 824, cert. den., 490 U.S. 1090. In that case, clergy did not offer any invocations and school officials did not monitor their content. The Eleventh Circuit also applied the traditional *Lemon* test, and held that the prayers served no secular purpose and that they conveyed a message that the school endorsed religion.

Finally, Petitioners make much of the Sixth Circuit Court of Appeals decision in *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987). It is this decision which serves as the linchpin of Petitioners' argument that there presently exists a direct conflict among the Circuit Courts of Appeals which has not been, and should be, resolved by this Court. Petitioners' argument, however, is fatally flawed.

The *Stein* Court was faced with a challenge, under the Establishment Clause, to student and clergy-led invocations at public high school graduation ceremonies, attendance at which was voluntary. The opinion for the Court adopted a *Marsh*, rather than a *Lemon*, analysis. Nevertheless, the Court held that

the specific prayers before it were constitutionally impermissible because they placed the state's imprimatur on one set of religious beliefs — Christianity. Thus, at most, the purported conflict with *Stein* is a conflict of reasoning, not result.

The Sixth Circuit Court of Appeals issued its decision in *Stein* on July 6, 1987. Only three weeks earlier this Court had decided *Edwards v. Aguillard*, 482 U.S. 578 (1987), which reaffirms the appropriateness of the *Lemon* test in school-related Establishment Clause cases, and which specifically notes that the rationale employed in *Marsh* was founded in an historical approach "not useful in determining the proper roles of church and state in public schools, since free public education was virtually non-existent at the time the Constitution was adopted." *Edwards v. Aguillard*, 482 U.S. at 583 n.4.

Since the *Stein* Court made no reference to *Edwards*, and since the decisions were issued only three weeks apart, it is reasonable to conclude that the Sixth Circuit did not have the benefit of *Edwards* when it decided to depart from settled Establishment Clause analysis and apply the rationale of *Marsh* to a public school prayer case. This Court's continued adherence to the *Lemon* test in *Edwards* has the effect of nullifying any conflict which may have existed among the Circuits that have addressed the constitutionality of prayer at public school functions.

Furthermore, the *Stein* Court found that on the facts before it, the prayers in issue "symbolically place[d] the government's seal of approval on one religious view" and were therefore constitutionally impermissible. *Stein v. Plainwell Community Schools*, 822 F.2d at 1410. The Court's reasoning is remarkably compatible with an analysis under the second prong of the *Lemon* test. This Court has consistently sought to insure that challenged government practices do not convey a message of endorsement, either of particular religious beliefs or of religion generally. *County of Allegheny v. American Civil*

Liberties Union, 492 U.S. 573 (1989). Thus, had the Sixth Circuit Court of Appeals followed a *Lemon*-type analysis in *Stein*, it is a reasonable extension of the rationale set forth in the opinion of the Court, as well as of the dissenting judge, that the actions of the school district were violative of the Establishment Clause.

In sum, the Courts of Appeals of the Ninth Circuit, the Eleventh Circuit, and the First Circuit have employed the same rationale and reached the same conclusion when faced with Establishment Clause challenges to prayer at extra-curricular public school events. The conflicting rationale employed by the Sixth Circuit Court of Appeals has been adjudged inappropriate by a subsequent decision of this Court. Furthermore, one can infer from language within the Sixth Circuit's decision that had it employed traditional Establishment Clause analysis, it would have rendered a decision consistent with the decisions of the First, Eleventh and Ninth Circuits. In effect, by its decision in *Edwards*, this Court has already resolved whatever conflict existed among the different Courts of Appeals.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SANDRA A. BLANDING*
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 & ST. PIERRE
 946 Centerville Road
 Warwick, Rhode Island 02886
 (401) 822-2900
Counsel for Respondent

**Counsel of Record*

February 22, 1991

APPENDIX I**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

DANIEL WEISMAN, personally	:	
and as next friend of DEBORAH	:	
WEISMAN	:	
VS.	:	No. 89-0377B
ROBERT E. LEE, individually and	:	
as principal of NATHAN BISHOP	:	
MIDDLE SCHOOL; ET AL.	:	

AGREED STATEMENT OF FACTS

1. Plaintiff, DANIEL WEISMAN, is now and has been since 1981, a resident of the City of Providence, State of Rhode Island. Plaintiff, DANIEL WEISMAN owns and has owned since 1982, real property located within the City of Providence. Since 1981, Plaintiff, DANIEL WEISMAN has paid and continues to pay real and personal property taxes to the City of Providence.

2. Plaintiff, DANIEL WEISMAN is now and at all times pertinent hereto has been a citizen of the United States.

3. Plaintiff, DANIEL WEISMAN is the father of Deborah Weisman, age 14, who has attended and continues to attend the public schools owned and operated by the City of Providence. Deborah Weisman graduated from the eighth grade at the Nathan Bishop Middle School in June, 1989, and now attends Classical High School. Both of the aforementioned schools are public schools owned and operated by the City of

Providence and are within the jurisdiction of the Defendant Members of the Providence School Committee and the Defendant Superintendent of Schools of the City of Providence.

4. The City of Providence uses and has used, at all times pertinent hereto, taxes raised from real and personal property located in the City of Providence to fund and operate the public schools located within the City, including the Nathan Bishop Middle School and Classical High School.

5. Defendant, ROBERT E. LEE is now and at all times pertinent hereto has been the principal of the Nathan Bishop Middle School, and as such is the administrator of said school.

6. Defendant THOMAS MEZZANOTTE is now and at all times pertinent hereto has been the principle of Classical High School and as such is the administrator of said school.

7. Defendant JOSEPH ALMAGNO is now and at all times pertinent hereto has been the superintendent of the Providence Public Schools, including but not limited to the Nathan Bishop Middle School and Classical High School and as such is responsible for the overall administration and supervision of the Providence Public Schools and of the implementation of the policies of the Providence School Committee.

8. Defendants VINCENT McWILLIAMS, ROBERT DeROBBIO, MARY BATASTINI, ALBERT LEPORE, ROOSEVELT BENTON, MARY SMITH, ANTHONY CAPRIO, BRUCE SUNDLUN, and ROBERT[O] GONZALEZ are now and at all times pertinent hereto have been members of the Providence School Committee and as such are responsible for the policies, operation, and supervision of the Providence Public Schools, including but not limited to the Nathan Bishop Middle School and Classical High School.

9. Defendants herein have at all times pertinent hereto been acting under color of state law.

10. The Providence School Department acting as an agency of the City of Providence and the State of Rhode Island, under

the authority and control of the Defendant Members of the Providence School Committee, are now and at all times pertinent hereto have been owners of the public schools located in the City of Providence and of all the equipment located therein.

11. The Defendant Members of the Providence School Committee and Superintendent of Schools sponsor, each year in the month of June, graduation and/or promotional ceremonies for the middle schools and high schools operated as public schools in the City of Providence, including the Nathan Bishop Middle School and Classical High School.

12. The Defendant Members of the Providence School Committee and the Superintendent of Schools are responsible for supervising and authorizing the content of the graduation and/or promotional ceremonies sponsored by the various public schools within the City of Providence.

13. The Defendant Members of the Providence School Committee and the Defendant Superintendent of the Schools are aware of, permit, and have authorized the principals of the various public schools within the City of Providence to include invocations and benedictions in the form of prayer, delivered by clergy, in the graduation ceremonies of the various public schools in the City of Providence.

14. Defendant ROBERT E. LEE, principal of the Nathan Bishop Middle School, received, from Assistant Superintendent of Schools Arthur Zarrella, a document entitled "Guidelines for Civic Occasions" as a guideline for the type of prayer to be included in the graduation ceremony of the Nathan Bishop Middle School. A copy of the aforementioned "Guidelines" is attached as Exhibit A and by reference incorporated herein.

15. Assistant Superintendent Arthur Zarrella sent the same "Guidelines for the Civic Occasions," set forth above as Exhibit A, to the principals of all of the City of Providence public schools.

16. The graduation ceremony at the Nathan Bishop Middle School held in June, 1989, was planned by two teachers and employees of the Providence School Department, who suggested to Defendant ROBERT E. LEE that Rabbi Leslie Y. Gutterman be asked to deliver the invocation and benediction at the June, 1989, promotional ceremony at the Nathan Bishop Middle School. Defendant ROBERT E. LEE accordingly requested Rabbi Gutterman to perform the same.

17. Defendant ROBERT E. LEE provided to Rabbi Gutterman a copy of the "Guidelines for Civic Occasions," set forth above as Exhibit A, and, in addition, spoke personally to Rabbi Gutterman to advise him that prayers that he gave at the invocation and benediction should be non-sectarian in nature.

18. Invocations and benedictions in the form of prayer have been included in some but not all of the graduation and/or promotional ceremonies of the high schools and middle schools operated by Defendant Members of the Providence School Committee in prior years and during 1989.

19. From 1985 through 1989, graduation ceremonies of Central High School were held at Veterans Memorial Auditorium, which the Providence School Department rented for the occasion. During each of the aforementioned years, Central High School produced and distributed programs describing the graduation ceremony which include the following information: 1985 Invocation Reverend Raymond Tetreault, St. Michael's Church, Benediction Lucy Santa, St. Michael's Church; 1986 Invocation Reverend William Tanguay, St. Michael's Church, Benediction Lucy Santa, St. Michael's Church; 1987 Invocation Reverend Raymond Malm, St. Michael's Church, Benediction Lucy Santa, St. Michael's Church; 1988 Invocation Dr. Virgil A. Wood, Pond Street Baptist Church, Benediction Dr. Virgil A. Wood, Pond Street Baptist Church; 1989 Invocation Reverend Moises Mercedes, Star of Jacob Christian Church, Benediction Reverend Moises Mercedes, Star of Jacob Christian Church.

20. For the years 1985 through 1989, Classical High School produced and distributed programs of the graduation ceremonies which indicate the following: 1985 Invocation Reverend Daniel M. Azzarone, Assistant Pastor, St. Anne's Church, Providence, Benediction Rabbi Shalom Strajcher, Providence Hebrew Day School; 1986 Invocation Dr. Virgil A. Wood, Pastor, Pond Street Baptist Church, Benediction Reverend Daniel M. Trainor, Pastor, Assumption of the Blessed Virgin Mary Church; 1987 Invocation Rabbi Daniel Liben, Temple Emmanuel, Benediction Reverend Patrick Soares, Assistant Pastor, Holy Name Church; 1988 Invocation Rabbi Leslie Gutterman, Temple Beth El, Benediction Reverend Dr. H. Lincoln Oliver, Olney Street Baptist Church; 1989 Invocation Rabbi Wayne M. Franklin, Temple Emanu-El, Benediction Reverend Robert Randall, Pastor, St. Sebastian's Church.

21. For the years 1985 through 1987 and 1989 graduation ceremonies of Hope High School were held at Veterans Memorial Auditorium, which the Providence School Department rented for the occasion. During each of the aforementioned years, Hope High School produced and distributed programs describing the graduation ceremony which include the following information: 1985 Benediction Dr. Daniel Brown; 1986 Invocation Reverend David Russ, Benediction Reverend David Russell; 1987 Invocation Reverend David Russell, God's Holy Tabernacle Church, Benediction Reverend David Russell; 1989 Invocation Reverend David Russell, God's Holy Tabernacle Church, Benediction Reverend David Russell.

22. For the years 1985 through 1988, Mount Pleasant High School held its graduation ceremonies at Rhode Island College. In 1989, graduation ceremonies for Mount Pleasant High School were held at Veterans Memorial Auditorium which the Providence School Department rented for the occasion. During each of the aforementioned years, Mount Pleasant High School produced and distributed programs describing the graduation

ceremony which include the following information: 1985 Invocation Reverend Frederick J. Halloran, Pastor, St. Theresa's Church, Benediction Reverend Frederick J. Halloran; 1986 Invocation Reverend Frederick J. Halloran, Pastor, St. Theresa's Church, Benediction Reverend Frederick J. Halloran; 1987 Invocation Reverend Frederick J. Halloran, Pastor, St. Theresa's Church, Benediction Reverend Frederick J. Halloran; 1988 Invocation Reverend Marcel E. Pincince, Blessed Sacrament Church, Benediction Reverence Marcel E. Pincince; 1989 Invocation Reverend Mario Bordignon, Pastor, St. Bartholomew's Church, Benediction Reverend Mario Bordignon, Pastor St. Bartholomew's Church.

23. For the years 1985, 1986, 1988 and 1989, Samuel W. Bridgham Middle School promotional ceremonies were held on school property. During each of the aforementioned years, Samuel W. Bridgham Middle School produced and distributed programs describing the promotional ceremony which include the following information: 1985 Invocation Father Peter Polo, Pastor, Holy Ghost Church; 1986 Invocation Reverend W.H. Johnson, Adventist Church; 1988 Reverend Clyde Walsh, St. Matthew's Church; 1989 Invocation Reverend W.H. Johnson, Adventist Church.

24. For the years 1983 through 1989, the Nathan Bishop Middle School promotional ceremonies were held on school property. During each of the aforementioned years, Nathan Bishop Middle School produced and distributed programs describing the promotional ceremony which include the following information: 1983 Invocation Father Patrick Soares, Holy Name Church, Benediction Father Patrick Soares, Holy Name Church, 1984 Invocation Reverend Earl Hunt, Benediction Reverend Earl Hunt; 1985 Invocation Reverend Bertrand Theroux, Benediction Reverend Bertrand Theroux; 1986 Invocation Reverend Robert E. Farrow, Benediction Reverend Robert E. Farrow; 1987 Invocation Rabbi Mark Jagolinzer,

Benediction Rabbi Mark Jagolinzer; 1988 Invocation Reverend Dr. Lincoln Oliver, Benediction Reverend Dr. Lincoln Oliver; 1989 Invocation Rabbi Leslie Gutterman, Benediction Rabbi Leslie Gutterman.

25. During the years 1984, 1986, 1987 and 1989, Nathaniel Greene Middle School held promotional ceremonies on school property. During each of the aforementioned years, Nathaniel Greene Middle School produced and distributed programs of the promotional ceremonies which indicate that no invocations or benedictions in the form of prayer were included in the ceremonies.

26. During the years 1985 through 1989, Windmill Intermediate School held promotional ceremonies on school property. During each of the aforementioned years, Windmill Intermediate School produced and distributed programs of the promotional ceremonies which indicate that no invocations or benedictions in the form of prayer were included in the ceremonies.

27. During the years 1983 through 1986 and 1989, Roger Williams Middle School held promotional ceremonies on school property. During each of the aforementioned years, Roger Williams Middle School produced and distributed programs of the promotional ceremonies which indicate that no invocations or benedictions in the form of prayer were included in the ceremonies.

28. During the years 1985 through 1989, the Oliver Hazard Perry Middle School held promotional ceremonies on school property. During each of the aforementioned years, Oliver Hazard Perry Middle School produced and distributed programs of the promotional ceremonies which indicate that no invocations or benedictions in the form of prayer were included in the ceremonies.

29. During the years 1985 through 1989, the Alternate Learning Project held graduation ceremonies on school prop-

erty. During each of the aforementioned years, the Alternate Learning Project produced and distributed programs of the promotional ceremonies which indicate that no invocations or benedictions in the form of prayer were included in the ceremonies.

30. All of the aforementioned schools are public schools located within the City of Providence and within the jurisdiction of Defendant Members of the Providence School Committee and Defendant Superintendent of Schools.

31. Each of the aforementioned invocations and benedictions delivered during the graduation and/or promotional ceremonies were prayers.

32. During the time that the Defendant ROBERT E. LEE served as Assistant Principal at Hope High School, a public school operated by the Providence School Department in the City of Providence, from 1983 to 1988 prayers were included at all the graduation ceremonies at Hope High School.

33. During the time that the Defendant ROBERT E. LEE served as Assistant Principal at Central High School, a public school operated by the Providence School Department in the City of Providence, from 1976 to 1983 prayers were included at all the graduation ceremonies at Central High School.

34. Graduation and/or promotional ceremonies sponsored by the Providence School Department within the middle schools and high schools under the jurisdiction of the Defendant Members of the Providence School Committee and Defendant Superintendent of Schools are conducted either on school premises or in facilities which the school department rents, using tax funds. The school facilities themselves are owned by the City of Providence.

35. The graduation ceremony for the eighth grade class of the Nathan Bishop Middle School, which class included Deborah Weisman, was held on the morning of June 20, 1989, on the premises of the Nathan Bishop Middle School.

36. The graduation ceremony of the Nathan Bishop Middle School on June 20, 1989, included an invocation and benediction in the form of prayer, delivered by Rabbi Leslie Y. Gutterman. The contents of the aforementioned invocation and benediction are attached hereto as Exhibit B and by reference made a part hereof.

37. The graduation ceremony of Classical High School held in June, 1989, on the premises of Classical High School, also included an invocation and benediction in the form of prayer.

38. It is the practice of Defendant THOMAS MEZ-ZANOTTE to include an invocation and benediction in the form of prayer in the graduation ceremonies that take place each year at Classical High School.

39. The graduation and promotional ceremonies held at the middle schools and high schools operated by the Providence School Department are supervised by employees and agents of Defendant Members of the Providence School Committee.

40. The invocations and benedictions delivered at the graduation and promotional ceremonies in the Providence public schools are delivered by members of the clergy chosen by agents of the Defendant Members of the Providence School Committee. These individuals are identified by name at the graduation and/or promotional ceremony at which they are speaking.

41. Attendance at graduation and promotional ceremonies is voluntary.

42. Parents and friends of students participating in promotional and/or graduation ceremonies at the Providence public schools are invited to attend the school's ceremonies.

43. Plaintiff, DANIEL WEISMAN, is opposed to and offended by the inclusion of prayer in the public school graduation and/or promotional ceremonies of his child both at the middle school and the high school level.

44. Municipal tax funds are used to operate and maintain the Providence public schools and to fund their graduation and/or promotional ceremonies.

45. Plaintiff, DANIEL WEISMAN, is opposed to the expenditure of his tax funds for school ceremonies which include prayer.

46. Some of the Providence public schools do not regularly include invocations and benedictions in the form of prayer in their graduation and/or promotional ceremonies.

47. Plaintiff, DANIEL WEISMAN, belongs to the Jewish faith.

48. Defendants have no plans to change their policy as to the inclusion of invocations and benedictions in the form of prayer at the graduation and/or promotional ceremonies of the Providence High Schools and Middle Schools. Accordingly, it is probable that future graduation ceremonies at various Providence public schools will include invocations and benedictions in the form of prayer.

49. Defendants intend to continue to allow the inclusion of invocations and benedictions in the form of prayer at the graduation and/or promotional ceremonies of the Providence public high schools and middle schools.

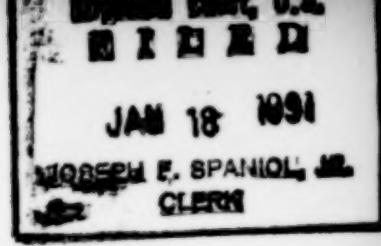
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③
No. 90-1014



**IN THE SUPREME COURT OF THE
UNITED STATES**
October Term, 1990

ROBERT E. LEE, et al.,
Petitioners,
v.

DANIEL WEISMAN, etc.,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIRST CIRCUIT**

**BRIEF AMICI CURIAE FOR THE STATES OF
UTAH, IDAHO, NORTH DAKOTA, PENNSYLVANIA,
AND WYOMING IN SUPPORT OF PETITIONERS'
REQUEST FOR CERTIORARI**

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INTEREST OF AMICI CURIAE

The State of Utah and the other states listed above, by and through their respective Attorneys General, appear on their own behalf, on behalf of their state boards of education, and on behalf of local school districts, political subdivisions of the state. Although this brief amici curiae highlights the State of Utah's current legal predicament, all amici curiae share the same interest in a clear pronouncement from the United States Supreme Court on the extent to which the Establishment Clause of the

First Amendment permits prayers at public school graduation ceremonies. All amici curiae operate public school systems. All have been or are actively engaged in litigation involving prayer at public school ceremonies, or are under a serious threat of such litigation.¹ Amici curiae take no position here on the merits of the substantive issue, i.e., the extent to which prayer is constitutionally permissible at public school graduation ceremonies. This brief amici curiae is submitted pursuant to Rule 37.5 solely to encourage this Court to grant certiorari and decide the important questions presented by petitioners.

The State of Utah is charged with the general supervision and maintenance of a public school system open to all children of the state. That duty arises from the Federal Enabling Act, 28 Stat. 107 (1894), and Article III of the Utah Constitution. In Utah, the public school system is comprised of the State Board of Education, granted general control and supervisory responsibility by Article X of the Utah Constitution and by Utah Code Ann. § 53A-1-401 (1989), and forty elected, tax-funded local boards of education, granted broad authority by Utah Code Ann. § 53A-3-402 (1989) to control and manage practices in local public schools, including the content of

¹Amici curiae are in the process of preparing a complete compilation of pending litigation that will be provided to the Court if certiorari is granted.

graduation and other public school ceremonies.

Since statehood in 1896, the tradition followed by most local boards of education in Utah has been to allow prayers at public school graduation exercises. Over the last few years, however, this practice has been challenged by individuals and groups as a religious practice that endorses religion in contravention of the Establishment Clause. More recently, the State of Utah, the State Board of Education, and several local school districts have become embroiled in lawsuits involving the same First Amendment claims raised in *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir. 1990).

In *Albright v. Board of Educ. of Granite School Dist.*, Civ. No. 90-C-639G (D. Utah, filed July 30, 1990), plaintiffs contend that local school districts and school officials have violated the Establishment Clause by permitting prayers to be offered by lay individuals at various public junior and senior high school graduation ceremonies. Conversely, in *Vaughn v. Washington County School Dist.*, Civ. No. 90-C-430W (D. Utah, filed May 15, 1990), recently settled by the parties, plaintiff sought to force the local school district to permit prayers at high school commencement.

An action by other Utah taxpayers, *Campbell v. Utah State School Bd.*, Civ.

No. 900503333 (Fifth Dist. Ct., filed October 24, 1990), still pending in state court, seeks damages and a declaratory judgment that local school boards are not prohibited by law from adopting policies permitting prayers at public meetings and public school ceremonies. This suit results from the State Board of Education's refusal to consider an administrative rulemaking petition seeking its precise delineation of the limits of prayer in public schools across the state.

As these cases demonstrate, Utah public school officials, like their colleagues nationwide, are subject to competing pressures from members of the public with diametrically opposed positions. Some expect and insist upon prayers as a traditional part of school graduation exercises. Others contend that any prayer in a public school context, even as part of a ceremony and not a classroom activity, constitutes an impermissible advancement of religion by the state.

State agencies and school officials are trapped in the middle of this dispute, not wishing to tread on First Amendment rights, but finding insufficient guidance in the conflicting and confusing case law. As more fully discussed in the argument section of this brief, the Courts of Appeals for the First and Sixth Circuits have reached opposite conclusions about the constitutionality of invocations and benedictions as part of public school

commencement exercises. The six members of those circuit panels are themselves in sharp disagreement about the constitutional analysis applicable in the public school ceremonial context and about whether any form of prayer in that setting--however redacted to eliminate denominational associations or references to a deity--can survive when scrutinized under the appropriate First Amendment test. These incompatible views of the commands of the First Amendment have also been adopted in conflicting decisions of state courts and federal district courts. Each view claims to find its support in the same United States Supreme Court precedents.

Given the current state of confusion in the law on this very volatile and divisive topic, definitive clarification is of urgent interest to the State of Utah and other amici curiae. Without a decisive resolution of the difficult First Amendment issues raised by prayers at public school ceremonies, the school systems and communities in our states will continue to be rent by disagreement over what the constitution allows or prohibits, and financially hard-pressed states will have to expend substantial sums relitigating the same issues through the state and federal court systems. Furthermore, local school districts will be forced to spend considerable amounts of time, energy, and scarce taxpayers' dollars defending themselves on all fronts, regardless of which position they take in the public school graduation prayer conflict.

The interests of the amici curiae will be well served by an exercise of the Court's discretion to grant certiorari in the instant case. The petition presents a straightforward and timely opportunity for the Court to consider the important Establishment Clause questions raised by school graduation prayers and to provide clear directions to state and local school officials about whether, and if so, how, to allow prayer at graduation and other public school ceremonies.

SUMMARY OF ARGUMENT

Resolution of the issue of the constitutionality of prayer at public school ceremonies such as graduation and commencement exercises is of great importance to the amici curiae states and their state and local school boards. The strong historical tradition of prayer at public ceremonial events creates an urgent need for clarification of conflicting court decisions. At this point, the decisions and supporting rationales are so divergent that there is no uniform standard upon which school districts and boards of education can confidently make choices, or upon which the states can offer counsel to their agencies and political subdivisions. Thus, the need for a clear determination is paramount. A decision by this Court would lay this divisive controversy to rest and prevent further diversion of resources into litigation and away from appropriate academic matters.

ARGUMENT

- I. THE DECISION AFFIRMED BY THE FIRST CIRCUIT COURT OF APPEALS DIRECTLY CONFLICTS WITH A DECISION OF THE SIXTH CIRCUIT, AS WELL AS THOSE OF NUMEROUS LOWER FEDERAL AND STATE COURTS.

The divergence between the constitutional analysis used by the district court in this case, adopted in full by the First Circuit Court of Appeals, and that used in *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), is fully set forth at pages 4-6 and 14-18 of the Petition for Certiorari already filed with the Court, and will only be summarized here by amici curiae. Simply put, the courts have reached opposite conclusions on whether the constitutionality of prayer at a public school graduation ceremony must be assessed using the historical analysis employed by the Court in *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding nonsectarian prayers opening state legislative sessions because of the long history of the practice), or the three-prong Establishment Clause test set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

In *Stein*, the Court of Appeals reversed a Michigan federal district court decision which had allowed graduation prayer. The appellate court analyzed the First Amendment issue under

a concept of "equal liberty of conscience" drawn from *Marsh*, 463 U.S. at 786. Finding itself at the boundary between public tradition and liberty of individual conscience, the Sixth Circuit relied on *Marsh* and concluded that secularized prayer at graduation ceremonies has the legitimate secular purpose of providing solemnity and dignity to the occasion. *Stein*, 822 F.2d at 1409. As to the specific prayers in question, the court found the language employed to be that of Christian theology and therefore suspect as placing government's seal of approval on one religious view. Thus, the prayers did not pass the *Marsh* test. *Id.* at 1410.

In contrast, the district court in the instant case rejected *Marsh* as inapplicable in the public school context. Instead, the court applied only the *Lemon* test, concluding that the nondenominational invocations and benedictions failed the second prong of the *Lemon* test. By invoking a deity, the court reasoned, the prayers at the public school commencement exercise had the primary effect of impermissibly advancing religion "by creating an identification of school with a deity." *Weisman*, 728 F. Supp. at 72.

This conflict over which test to use, as well as over whether mention of a deity renders a nondenominational prayer impermissible in the graduation ceremony context, is also evident in numerous state appellate court and federal district court decisions. Thus, for

example, graduation ceremony prayer was upheld in *Sands v. Morongo Unified School Dist.*, 214 Cal. App. 3d 45, 262 Cal. Rptr. 452, review granted, 264 Cal. Rptr. 683, 782 P.2d 1139 (1989); *Grossberg v. Deusebio*, 380 F. Supp. 285 (E.D. Va. 1974); *Wood v. Mt. Lebanon Township School Dist.*, 342 F. Supp. 1293 (W.D. Pa. 1972); and *Wiest v. Mt. Lebanon Township School Dist.*, 457 Pa. 166, 320 A.2d 362, cert. denied, 419 U.S. 967 (1974). However, similar invocations and benedictions at graduation ceremonies were invalidated in *Lundberg v. West Monona Community School Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989); *Graham v. Central Community School Dist.*, 608 F. Supp. 531 (S.D. Iowa 1985); *Kay v. David Douglas School Dist.*, 79 Or. App. 384, 719 P.2d 875 (1986), rev'd on other grounds, 303 Or. 574, 738 P.2d 1389 (1987), cert. denied, 484 U.S. 1032 (1988); and *Bennett v. Livermore Unified School Dist.*, 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987).

Where prayers at graduation have been approved, the courts have relied on a "secular" or "nonsectarian" rationale. Where prayers are disapproved, the rationale often does not question prayer *per se*, but rather focuses on the offending language or words used. Even removing the offending words, such as deity names, may be insufficient if the content of the edited prayer suggests that a deity may be even *thought of*. See e.g., *DeSpain v. DeKalb County Community School Dist.*, 384 F.2d 836 (7th Cir. 1967) (required recitation of verse not

expressly mentioning deity held unconstitutional as classroom prayer), cert. denied, 390 U.S. 906 (1968).

The foregoing cases demonstrate the disarray created by courts' attempts to sort out the precise words of prayer which can constitutionally be used at public school ceremonies. If the courts cannot be clear, it is certain that school officials and their advisers will be confused, too. Not only do the conflicting decisions rely on different Establishment Clause tests, they reach different conclusions concerning what precise words of prayer are permissible. This situation results in unclear guidance, if any, for those officials responsible for school operations.

II. THE QUESTION OF PRAYER AT GRADUATION AND OTHER PUBLIC SCHOOL CEREMONIES IS ONE OF NATIONAL SIGNIFICANCE

Religion and belief in a deity generally have been an integral part of this nation's history from its beginning, including a recognition "that all men ... are endowed by their Creator with certain unalienable Rights" in the Declaration of Independence. This Court itself has characterized the United States as a religious nation and people, citing references to God in national historical documents and almost every state constitution. *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 514 (1892). Indeed, references to a deity are part of many national observances and patriotic customs,

including our pledge of allegiance and national motto. 36 U.S.C. §§ 172, 186 (1988). As noted above, this Court has recognized public prayer at a session of a state legislature as a valid tradition. *Marsh v. Chambers*, 463 U.S. 783 (1983).

The use of invocations and other forms of prayer at other public ceremonies, including school commencement exercises, is also a long-standing tradition in this country. Yet, in the area of public schools, "the Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). In *Engel v. Vitale*, 370 U.S. 421 (1962), this Court invalidated a state program requiring daily recitation of an officially composed prayer. In *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), the Court struck down the daily recitation of the Lord's Prayer with scripture reading. The following year, the Court again invalidated the regular recitation of the Lord's Prayer by reversing the Florida State Supreme Court, which twice had allowed the practice. *Chamberlain v. Dade County Bd. of Public Instruction*, 377 U.S. 402 (1964). Twenty-one years later, the Court held that a statute authorizing a period of silence for meditation or voluntary prayer and allowing teachers to lead a prescribed prayer, authorized by the state legislature with the sole purpose of returning prayer to public school classrooms, violated the Establishment Clause. *Wallace v.*

Jaffree, 472 U.S. 38 (1985). While the foregoing decisions characterized the prayer at issue as "voluntary" by state law, each case dealt with regular prescribed or set prayer with teachers in the classroom.

Most recently, however, the Court has validated prayer in the context of a prayer club meeting on a high school campus under the Equal Access Act. *Board of Educ. of Westside Community Schools v. Mergens*, 495 U.S. ___, 110 S.Ct. 2356 (1990). In *Mergens*, Justice O'Connor, writing for the majority, focused on the compulsory nature of attendance, the maturity of students, and whether allowing such a club on campus is an endorsement of religion, and concluded that the Act did not transgress the Establishment Clause by allowing a religious student group equal access to school space on the same basis as other groups. *Mergens* suggests that prayer at a school ceremony outside the classroom context may be constitutionally valid.

In light of long-standing national, state, and local traditions employing prayers at ceremonial gatherings, the citizens of this nation need to know if the use of prayer, constitutionally permissible at other public ceremonies, is permissible in the context of a public school commencement ceremony.

CONCLUSION

The school graduation prayer question potentially affects every state, every board of education, and every school district in the nation. What we have is a hodgepodge of tests, rationales, and results. What we need is either a uniform standard for constitutionality upon which local officials may exercise their discretion to have or not have prayer at graduation exercises, or a clear message that prayer at graduation, despite its long tradition, is forbidden as an unconstitutional practice that endorses religion.

For these reasons, amici curiae urge the Court to grant certiorari in this case and answer the questions presented.

Respectfully Submitted,

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Counsel for Amici Curiae

January 17, 1991

In the Supreme Court of the United States

OCTOBER TERM, 1990

**ROBERT E. LEE, INDIVIDUALLY AND AS PRINCIPAL OF
NATHAN BISHOP MIDDLE SCHOOL, ET AL., PETITIONERS**

v.

DANIEL WEISMAN, ETC.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether government accommodation of religion in civic life violates the Establishment Clause, absent some form of government coercion.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1014

ROBERT E. LEE, INDIVIDUALLY AND AS PRINCIPAL OF
NATHAN BISHOP MIDDLE SCHOOL, ET AL., PETITIONERS

v.

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INTEREST OF THE UNITED STATES

The School Committee of Providence, Rhode Island, has for many years permitted principals to include invocations and benedictions in the city's junior high and high school graduation ceremonies. The courts below held that this practice violates the Establishment Clause of the First Amendment, as applied to States through the Fourteenth Amendment.

The United States has a significant interest in this case. The United States is authorized to operate primary and secondary schools for military and foreign service dependents under certain circumstances (10 U.S.C. 7204 (Navy); 20 U.S.C. 241 (federal property); 20 U.S.C. 926 (Defense Department); 22 U.S.C. 2701 (foreign service)) and for Native Americans (25 U.S.C. 271-340). The resolution of this case will bear directly on the operation of these schools.

In addition, the United States conducts numerous public ceremonies in which religion is acknowledged in some manner. Many of these ceremonies — presidential inaugurations, for example — date back to the founding of the Republic. These traditions, which the United States has a profound interest in preserving, could be called into question under the broader implications of the decisions below.

The United States has participated as a party or as amicus curiae in numerous cases arising under the Establishment and Free Exercise Clauses, most recently in *Board of Education of the Westside Community Schools v. Mergens*, 110 S. Ct. 2356 (1990), and *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086 (1989). See also briefs amicus curiae filed in *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Sloan v. Lemon*, 413 U.S. 825 (1973); and *Lemon v. Kurtzman*, 403 U.S. 602 (1971); and briefs filed as a party in *United States v. Lee*, 455 U.S. 252 (1982), and *Tilton v. Richardson*, 403 U.S. 672 (1971).

STATEMENT

1. Each year, junior and senior high schools in Providence, Rhode Island, hold graduation ceremonies for students and their families. For many years, it has been the custom to invite local members of the clergy to deliver invocations and benedictions at these ceremonies. In advance of the ceremonies, clergy members are provided by the school system with a pamphlet entitled "Guidelines for Civic Occasions" prepared by the National Conference of Christians and Jews. The guidelines recommend that the prayers for such nonsectarian occasions be composed with "inclusiveness and sensitivity." Pet. App. 19a.

This case arose as a result of the June 1989 graduation ceremony conducted at one of the city's junior high schools, the Nathan Bishop Middle School.¹ As in years past, the ceremony took place at the school, and in the course of the ceremony a member of the clergy — on this occasion Rabbi Leslie Gutterman of Temple Beth El of Providence — delivered an invocation and a benediction. Rabbi Gutterman's invocation and benediction both referred to God. Pet. App. 19a-20a & nn. 2-3.

Respondent's daughter, Deborah Weisman, was among the graduating students who attended Nathan Bishop's 1989 ceremony. She is now a freshman at the city's Classical High School. Pet. App. 20a-21a.

2. Daniel Weisman sued petitioners in district court, alleging that the inclusion of invocations and benedictions in graduation ceremonies at the city's public junior high and high school graduation ceremonies violated the Establishment Clause of the First Amendment as applied to the States through the Fourteenth Amendment. The district court entered judgment in favor of Weisman on the basis of stipulated facts and issued a permanent injunction "enjoin[ing] [petitioners] from authorizing or encouraging the use of prayer in connection with school graduation or promotion exercises." Pet. App. 31a.²

¹ Like the city's other public school graduation ceremonies, the Nathan Bishop Middle School ceremony was sponsored by the Providence School Committee and the superintendent of the Providence School Department. The Committee and Superintendent generally leave the planning of each school's ceremony to the school principal, and they permit, but do not require, the ceremonies to include invocations and benedictions. It is the Assistant Superintendent of Schools who provides principals with the "Guidelines for Civic Occasions" pamphlet. Pet. App. 19a-20a; see also Agreed Statement of Facts 3-4, 9-11.

² The court had previously refused to issue a temporary restraining order preventing the inclusion of an invocation and benediction at Nathan Bishop's 1989 graduation ceremony. Pet. App. 19a-20a.

Reviewing the challenged practice under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court determined that it failed the "second prong of the *Lemon* analysis." Pet. App. 23a. In the court's view, inclusion of a benediction and invocation at graduation ceremonies had the impermissible effect of advancing religion in two ways. First, it "present[ed] a 'symbolic union' of the state and schools with religion and religious practices." *Id.* at 24a. Second, it "convey[ed] a tacit preference for some religions, or for religion in general over no religion at all." *Id.* at 25a. The court viewed its determination that ceremonial invocations and benedictions impermissibly endorse religion as "a foregone conclusion; that is, the reference to a deity necessarily implicates religion." *Ibid.*³

The court refused to follow *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987). In *Stein*, the Sixth Circuit held that invocations and benedictions in public school graduation ceremonies are not per se unconstitutional. The *Stein* court had relied upon *Marsh v. Chambers*, 463 U.S. 783 (1983), in which this Court upheld against an Establishment Clause challenge the Nebraska legislature's practice of opening each day's session with a prayer offered by a paid chaplain. The district court here rejected the approach in *Stein*, concluding that the "*Marsh* holding was narrowly limited to the unique situation of legislative prayer" and thus did not apply to similar religious references at graduation ceremonies. Pet. App. 27a. The district court similarly refused to consider the history of including invocations and benedictions in public school graduation ceremonies. The court read *Marsh* as requiring consideration of the history of the challenged practice only when the specific practice was extant when the Republic was founded.

³ The court found it unnecessary to decide under *Lemon* whether the practice challenged here had a secular purpose and avoided excessive entanglement between government and religion. See Pet. App. 23a.

Since the tradition here was only 160 years old, the court deemed the history of that tradition to be irrelevant. *Id.* at 26a & n.8. The court concluded by indicating that invocations and benedictions would be acceptable, but only if they omitted any reference to a deity. *Id.* at 28a-29a.

3. A divided panel of the First Circuit affirmed. Pet. App. 1a-17a. Writing for the majority, Judge Torruella found nothing to add to the "sound and pellucid opinion of the district court." *Id.* at 2a.

Judge Bownes concurred. Pet. App. 3a-13a. Writing separately, he concluded that the ceremonial invocations and benedictions were impermissible under each part of the three-part *Lemon* analysis. Pet. App. 9a-10a. Like the district court, Judge Bownes dismissed this Court's decision in *Marsh* as inapposite. *Marsh*, according to Judge Bownes, "was based on the 'unique' and specific historical argument that the framers did not find legislative prayers offensive to the Constitution because the First Congress approved of legislative prayers." Pet. App. 11a. *Marsh* did not apply here "since free public schools were virtually nonexistent at the time the Constitution was adopted." Pet. App. 11a (quoting *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987)). Unlike the district court, Judge Bownes did not believe that public ceremonial invocations and benedictions would be permissible if they omitted any reference to a deity. Invocations and benedictions, in his view, "are by their very terms prayers and religious." Pet. App. 13a.

Judge Campbell dissented from what he considered "the[] extreme views of [his] colleague[s]." Pet. App. 14a. He did not believe that the Constitution prohibits "message[s] * * * especially suitable for a rite of passage like a graduation, where those present wish to give deeply felt thanks." *Ibid.* Instead, he found that "*Marsh* and *Stein* provide a reasonable basis for a rule allowing invocations and benedictions on public, ceremonial occasions," so long as school authorities invited speakers representing a wide range of religious beliefs and ethical philosophies. *Id.* at 16a.

DISCUSSION

The courts below invalidated the benediction and invocation here on the basis of the "effects" test of *Lemon*. In doing so, they refused to consider the history of the ceremonial practice challenged or to assess it in light of other traditional acknowledgements of religion that this Court has sustained, notably in *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Lynch v. Donnelly*, 465 U.S. 668 (1984). Accordingly, this case raises the question whether the historical tradition of religious references at civic ceremonies—a tradition that reaches back to the time of the Founding—permits such recognition in contemporary settings. Even more fundamentally, it raises the question whether the presumptive applicability of the *Lemon* test to all Establishment Clause challenges should be reconsidered in light of its persistent tendency to invalidate practices with substantial historical sanction.

Since its creation, the *Lemon* test has been the source of widespread confusion and deep division among the lower courts. Its rigid doctrinal framework has, time and again, presented lower federal courts—and this Court—with enormous difficulty in squaring the Nation's tradition of acknowledging forthrightly its religious heritage with the Court's First Amendment doctrine.

Indeed, the decision below has created a split in the circuits with respect to the proper framework for analyzing Establishment Clause challenges to the manifestly benign practice at issue here—a ceremonial invocation and a solemn expression of gratitude for "the legacy of America where diversity is celebrated and the rights of minorities are protected." Pet. App. 20a n.2. In *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (1987), the Sixth Circuit embraced the same approach as Judge Campbell in dissent in this case to analyze invocations and benedictions at public school graduation ceremonies. The court in *Stein* determined

that "annual graduation exercises * * * are analogous to the legislative and judicial sessions referred to in *Marsh*." 822 F.2d at 1409. The *Stein* court accordingly indicated that, while the sectarian invocation and benediction involved there were impermissible, nonsectarian acknowledgements of a deity during graduations—such as that involved here—did not run afoul of the Establishment Clause. *Id.* at 1409-1410.

As in this case, each member of the panel in *Stein* wrote separately to endorse a different mode of analyzing this common fact pattern. Chief Judge Merritt viewed the issue as "governed by the * * * principles of [*Marsh*]" alone and did not apply the *Lemon* test. *Stein*, 822 F.2d at 1409. In contrast, Judge Milburn applied *Lemon* but upheld nonsectarian prayer by relying on its ceremonial aspect. 822 F.2d at 1410 (Milburn, J., concurring). The dissenting member of the panel, Judge Wellford, applied *Lemon* but held that even sectarian prayer did not advance religion within the meaning of the *Lemon* test in light of the historical evidence adduced in *Marsh* that the delegates to the Constitutional Convention did not consider such ceremonial prayers as problematic. 822 F.2d at 1416 (Wellford, J., dissenting). This *Lemon*-spawned cacaphony is a commonplace among district courts that have been called upon to address the same or similar facts in response to Establishment Clause challenges.⁴

⁴ Compare *Grossberg v. Deusebio*, 380 F. Supp. 285, 289-290 (E.D. Va. 1974) (inclusion of invocation in public high school graduation ceremony did not violate Establishment Clause) and *Wood v. Mount Lebanon Township School Dist.*, 342 F. Supp. 1293, 1294-1295 (W.D. Pa. 1972) (same) with *Lundberg v. West Monona Community School Dist.*, 731 F. Supp. 331, 341-346 (N.D. Iowa 1989); *Graham v. Central Community School Dist.*, 608 F. Supp. 531, 534-537 (S.D. Iowa 1985) and *Doe v. Aldine Indep. School Dist.*, 563 F. Supp. 383, 885-888 (S.D. Tex. 1982). The state courts are also in disarray on the question. Compare *Sands v. Morongo Unified School Dist.*, 214 Cal. App. 3d 45, 262 Cal. Rptr. 452 (1989) (upholding invocation at high school graduation on basis of *Marsh*) with *Bennett v. Livermore Unified School Dist.*, 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987) (holding that inclusion of an invocation at high school graduation fell afoul of the *Lemon* test).

The uncertainty and confusion stem from the uneasy relationship between reliance upon history—exemplified by this Court's decisions in *Marsh v. Chambers* and *Lynch v. Donnelly*—and *Lemon*'s three-part test.

The varying approaches are fairly represented by the opinions in this case. Since this case involves a fact pattern that has now divided the circuits and in light of the significance of the issues presented, we believe this case warrants the Court's review. The case would afford the Court an appropriate opportunity to reconsider the application of the *Lemon* test to the attempts to accommodate the Nation's religious heritage in our public life. In our view, the Court should hold that the traditional public acknowledgements of religion at issue here, like those before the Court in *Marsh* and *Lynch*, do not violate the Establishment Clause because they neither establish any religion nor coerce nonadherents to participate in any religion or religious exercise against their will. The Court, we urge, should do expressly what it did implicitly in *Marsh*—jettison the framework erected by *Lemon*'s tripartite analysis in circumstances where, as here, the practice under assault is a non-coercive, ceremonial acknowledgment of the heritage of a deeply religious people.

1. We are not asking this Court to grant review in this case to overrule any of its precedents; indeed, we have no occasion here to question the precise holding of *Lemon* itself. What we do question is the constitutional underpinning and continuing validity of the so-called *Lemon* "test," a formula that has developed a life of its own divorced both from the context of *Lemon* itself and from the constitutional command it seeks to illuminate. Indeed, it is not at all clear that the *Lemon* Court intended its discussion to be an articulation of such a comprehensive "test."⁵ And in

⁵ Chief Justice Burger's opinion for the Court introduced what has become the *Lemon* test simply by noting that "[e]very analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years." 403 U.S. at 612.

seeking explicit reconsideration of the Court's reliance on this test, we are guided by the Court's own expressed "unwillingness to be confined to any single test or criterion in this sensitive area," *Lynch*, 465 U.S. at 679, and the implicit recognition by this Court⁶ and the lower courts⁷ that the *Lemon* formula is, at least in some circumstances, an unhelpful guide to adjudicating Establishment Clause claims.

Indeed, a majority of the Members of the Court has written to express dissatisfaction with different aspects of the *Lemon* test. See *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086, 3134 (1989) (Kennedy, J., concurring in the judgment and dissenting in part) ("Substantial revision of our Establishment Clause doctrine may be in order"); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (*Lemon* test is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results"); *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting) (expressing "doubts about the entanglement test"); *Roemer v. Board of Public Works*, 426 U.S. 736, 768 (1976) (White, J., concurring in the judgment) ("I am no more reconciled now to *Lemon I* than I was when it was decided. * * * The threefold test of *Lemon I* imposes unnecessary, and * * * superfluous tests for establishing [a First Amendment violation]"); *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("pessimistic evaluation * * * of the totality of *Lemon* is particularly applicable to the 'purpose' prong").

⁶ See, e.g., *Marsh v. Chambers*, *supra* (deciding Establishment Clause case without employing *Lemon* test).

⁷ See, e.g., *Peyote Way Church of God, Inc. v. Thornburgh*, No. 88-7039 (5th Cir. Feb. 6, 1991) (deciding Establishment Clause case without employing *Lemon* analysis); see also slip op. 2208 (referring to "[t]he markedly different approaches the [Supreme] Court takes to answering establishment clause questions").

In our view, the first step in replacing the *Lemon* formula is a recognition that the contemporaneous understanding of the Clause, as reflected in historical practice, must be examined to determine the validity of challenged activities. The Court has already recognized that interpretation of the Establishment Clause must "comport[] with what history reveals was the contemporaneous understanding of its guarantees." *Lynch*, 465 U.S. at 673.⁸ Indeed, the Court's "Establishment Clause precedents have recognized the special relevance in this area of Mr. Justice Holmes' comment that 'a page of history is worth a volume of logic,'" *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 777 n.33 (1973) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).⁹

In seeking guidance from history, the Court has not limited its search to evidence that the specific activity challenged in a particular case existed at the Founding and was approved of by the Framers. To be sure, when such evidence exists, it has disposed of an Establishment Clause challenge. Thus, the holding in *Marsh* was largely based on the common-sense observation that

[i]t can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain [to deliver opening prayers] for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended

⁸ See also *School Dist. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.").

⁹ By the same token, the Court has steadfastly "declined to construe the Religion Clauses" in a manner "that would undermine the ultimate constitutional objective as illuminated by history," *Walz v. Tax Commissions*, 397 U.S. 664, 671 (1970) (emphasis added).

the Establishment Clause of the Amendment to forbid what they had just declared acceptable.

463 U.S. at 790.

It is clear from *Lynch* and other decisions, however, that the Court has not hesitated to draw inferences from long-established traditions to approve practices in contemporary settings. In *Lynch*, the Court concluded that the Establishment Clause did not prohibit city officials from including a nativity scene in a holiday display. 465 U.S. at 681-685. In reaching this conclusion, the Court did not limit itself to evidence of how Christmas was celebrated in 1789, but also considered a wide variety of other types of public acknowledgements of religion. *Id.* at 672-678, 686.¹⁰ Many of the examples cited by the Court, in fact, were ceremonial invocations of the deity by public figures, both historic and contemporary, similar to those at issue here. *Id.* at 675 & nn. 2 & 3.¹¹ In this way, the holding in *Lynch* was broadly informed by the inferences to be drawn from "an unbroken history of official acknowledgment by all three branches of [the] government of the role of religion." *Id.* at 674. See also *McGowan v. Maryland*, 366 U.S. 420, 431-434 (1961) (reviewing history of Sunday Closing Laws).

Nonetheless, despite its recognition of the centrality of history, the Court has continued to adhere to the *Lemon* test as its primary guide to analysis. See *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987). The United States

¹⁰ The record in *Lynch* indicated that "at the time of the adoption of the Constitution and the Bill of Rights, there was no settled pattern of celebrating Christmas, either as a purely religious or as a public event." 465 U.S. at 720 (Brennan, J., dissenting).

¹¹ Thus, contrary to Judge Bownes' suggestion (Pet. App. 11a), consideration of the history of the tradition challenged here was not foreclosed by *Edwards v. Aguillard*, 482 U.S. 578 (1987). While the Court in *Edwards* eschewed a historical approach when reviewing public school curricula challenged under the Establishment Clause (*id.* at 583 n.4), that decision is inapposite here.

has previously expressed serious reservations about this approach, because we believe that experience has demonstrated that the *Lemon* test cannot be relied upon as an algorithm capable of resolving all difficult Establishment Clause questions.¹² To the contrary, the *Lemon* test was developed to divine the intended meaning and scope of the Establishment Clause in the setting of government financial aid to plainly religious institutions. Whatever its continuing validity in that specialized context, we believe it is inappropriate to apply the test to other situations in which the intended meaning and scope of the Establishment Clause can be more readily divined from historical sources, such as those described above.

Moreover, the *Lemon* test has spawned persistent confusion in the lower courts, particularly in its application to practices with historical sanction. Indeed, the anomalies that result from treating the *Lemon* test—rather than the historical understanding of the Clause's guarantees—as the touchstone of its jurisprudence are vividly illustrated by this case. In striking down the invocation and benediction at Nathan Bishop Middle School graduation, the court below had to turn a blind eye to the fact that the same invocation and benediction at issue in this case could have been delivered at the opening of Congress or during a presidential inauguration ceremony. See *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. at 3142 n.9 (Kennedy, J., concurring in the judgment in part and dissenting in part).¹³ Despite the fact that the benefit to religion

¹² See Brief of the United States at 43-44 in *Board of Education of the Westside Community Schools v. Mergens*, *supra*; Brief of the United States as Amicus Curiae at 23-26 in *Lynch v. Donnelly*, *supra*.

¹³ The most recent inaugural address began with a prayer. *Inaugural Address*, 25 Weekly Comp. Pres. Doc. 99 (Jan. 20, 1989).

conferred by inclusion of religious references at the Nathan Bishop Middle School graduation could hardly be considered on a par with that conferred by their inclusion in ceremonies central to the Nation's public life, the lower court considered it "a foregone conclusion" that the former practice had the "effect of advancing religion" within the meaning of the *Lemon* test and thus was invalid.

Even lower courts that uphold practices similar to those at issue (and so avoid anomalies of the sort described above) face other embarrassments in seeking seriously to apply the *Lemon* test. For instance, in order to assert that such practices do not advance religion, the lower courts are tempted to deny the obvious religious significance of traditional religious references. It counts against both the efficacy and candor of the *Lemon* test that it places judges in the unfortunate position of denigrating religious meaning in order to stave off a *Lemon*-inspired assault on traditional practices.¹⁴

¹⁴ The other two parts of the *Lemon* test also have substantial defects. The first prong of the test, which focuses on whether a practice has a secular purpose, is not well designed to distinguish between those practices that violate the Establishment Clause and those that do not. For instance, even an establishment of an official church could have and historically often had a secular purpose—the promotion of social stability and cohesion. Moreover, even the kind of secular purpose which the courts have upheld, such as the solemnizing purpose of an invocation, see *Lynch v. Donnelly*, 465 U.S. at 692-693 (O'Connor, J., concurring) is wholly dependent on the religious effect of the practice: an invocation with a deistic reference solemnizes precisely because it moves the audience to think of its Creator. An invocation is not simply a call to order. Furthermore, the third prong, which seeks to prevent "entanglement" between church and state, is mocked by the current operation of the test itself: in assessing the degree to which symbols such as a Christmas tree, menorah, and creche express a particular religious faith, courts themselves risk turning into "a national theology board" every holiday season. *Allegheny v. American Civil Liberties Union*, *supra*, 109 S. Ct. at 3146 (Kennedy, J., concurring in part and dissenting in part).

Moreover, we respectfully suggest that application of the *Lemon* test has tended to create anomalies in this Court's jurisprudence as well. In *County of Allegheny v. American Civil Liberties Union*, the Court simultaneously held that display of a creche in Pittsburgh violated the Establishment Clause while the display of a menorah in the same city did not. While every Justice purported to apply the *Lemon* test, there were four separate opinions in the case and only two Justices agreed with both holdings. See *County of Allegheny*, 109 S. Ct. at 3086 (opinion of Blackmun, J.); *id.* at 3117 (opinion of O'Connor, J.); *id.* at 3124 (opinion of Brennan, J.); *id.* at 3134 (opinion of Kennedy, J.). The display of the Pittsburgh creche was invalidated despite the fact that four years earlier the Court had upheld the display of a Rhode Island creche situated in the company of Santa Claus and his reindeer. See *Lynch v. Donnelly*, *supra*. Such decisions do not appear to be the application of any historically rooted constitutional principle. They reflect, rather, a struggle over a doctrine which is destined to further confuse and divide the lower courts and the Nation itself. Accordingly, we respectfully ask the Court, in the light of both historical understanding and judicial experience, to reconsider the scope and application of the *Lemon* test, at least outside the area whence *Lemon* itself came — financial assistance to plainly religious institutions.¹⁵

¹⁵ We by no means suggest that the *Lemon* test has led to consistent results even in the public funding area. Quite the contrary. Compare *Meek v. Pittenger*, 421 U.S. 349, 367-371 (1975) (state employees may not provide remedial and accelerated instruction, guidance counseling and testing, speech and hearing services in nonpublic schools), with *Wolman v. Walter*, 433 U.S. 229, 241-248 (1977) (state employees may provide speech and hearing diagnostic testing (where these provisions of statute severable) within sectarian school; guidance, remedial and therapeutic services may be provided in mobile unit off site of religious school).

2. Should this case be granted plenary consideration, we would argue that the "contemporaneous understanding of [the Establishment Clause's] guarantees," *Lynch*, 465 U.S. at 673, suggests the *Lemon* test should, at least in the area of accommodation of religious heritage in civic life, be replaced by a single, careful inquiry into whether the practice at issue provides direct benefits to a religion in a manner that threatens the establishment of an official church or compels persons to participate in a religion or religious exercise contrary to their consciences. See *County of Allegheny*, 109 S. Ct. at 3136 (Kennedy, J., concurring in the judgment in part and dissenting in part) (urging a similar test).¹⁶

We believe that evidence, including that adduced in *Marsh* and *Lynch*, shows that the Framers fully assented to the appearance of non-coercive religious practices in civic life. To focus, as the lower courts have done, on the fact that the specific type of ceremony at issue did not exist when the Constitution was adopted is to blind oneself to the broader truth on which *Marsh* was founded: that public ceremonial acknowledgments of religion were welcomed by the Framers and are deeply rooted in the Nation's heritage.¹⁷ Indeed,

¹⁶ As Justice Kennedy notes in his opinion in *Allegheny*:

These two principles, while distinct, are not unrelated, for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing.

109 S. Ct. at 3136 (concurring in part and dissenting in part).

¹⁷ Indeed, it is difficult to square this Court's precedents regarding the government's properly accommodating attitude toward religion with a view that religious references in public life are as a general matter intolerable for nonadherents. As the Court has recognized, "[i]t has never been thought either possible or desirable to enforce a regime of total separation." *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. at 760. Such a total separation would clearly require

history suggests that listening to a religious invocation at a civic ceremony was seen not as an establishment of religion by the government but, on the contrary, as an expression of civic tolerance and accommodation to all citizens.¹⁸

Moreover, acceptance of religious references at civic ceremonies reflects only part of the substantial historical evidence that religious coercion was the essence of what the Establishment Clause was designed to prevent. See *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. at 3135-3138 (Kennedy, J., concurring in the judgment in part and dissenting in part); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 135-137 (7th Cir. 1987) (Easterbrook, J., dissenting); McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986). Historical materials suggest that the presence of religion in public life was not generally considered offensive at the time of the Framing and indeed was often welcomed so long as that presence was not coercive and not part of an establishment of an official church.¹⁹

an elaborate effort to reshape our traditions—to establish, in effect, irreligion. See also *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 235-236 (1948) (Jackson, J., concurring). The government's proper role, in contrast, has been understood to be one of "benevolent neutrality" toward religion in which "there is room for play in the joints," *Walz v. Tax Commissions*, 397 U.S. at 669 (emphasis added), room that allows for appropriate recognition of the Nation's religious heritage.

¹⁸ For instance, in addressing concerns that a prayer opening the session of the First Continental Congress would be divisive, Samuel Adams stated that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country." C. Adams, *Familiar Letters of John Adams and his Wife, Abigail Adams*, quoted in *Marsh v. Chambers*, 463 U.S. at 791-792.

¹⁹ For instance, many of the Nation's founders thought that it was not merely permissible to recognize the role of religion in the Nation's life but necessary to the very preservation of the Nation. George

We recognize that opinions constituting a majority of the Court in the *County of Allegheny* indicated that proof of the coercive nature of a challenged activity was not necessary to demonstrate an Establishment Clause violation. 109 S. Ct. at 3119. (O'Connor, J., concurring). However, as noted above, *Allegheny* was itself an application of the test that we believe should be reconsidered in this area.²⁰

Moreover, we agree that Establishment Clause concerns are triggered not only by coercion in the form of direct, legal compulsion, but also in the form of more indirect social

Washington expressly addressed the issue in his farewell address, itself a ceremonial occasion:

Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation *desert* the oaths, which are the instruments of investigation in Courts of Justice? And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.

Fitzpatrick, *The Writings of George Washington from the Original Manuscript Sources 1745-1799, Farewell Address*, at 214, 229. See also Northwest Ordinance, Article III (1787) ("Religion, morality, and knowledge being necessary to good government, schools and means of education shall ever be encouraged.") (emphasis added).

²⁰ In any event, this Court's decisions do not preclude taking the absence of coercion into account as a relevant, if not predominant factor, in determining whether an activity advances religion. Indeed, the intention underlying an activity—on the one hand, to encourage adherence to religious tenets or, on the other, simply to acknowledge the existence of beliefs important to the community—will directly bear on whether the activity "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). See also *Board of Education of the Westside Community Schools v. Mergens*, 110 S. Ct. 2356, 2372 (1990) (O'Connor, J.).

coercion. For instance, we recognize that the special character of the public school setting has heightened this Court's sensitivity to subtle forms of coercion. See, e.g., *Engel v. Vitale*, 370 U.S. 421, 430-431 (1962). We do not believe, however, that graduation ceremonies pose a risk of coercion. Such ceremonies typically occur but once a year. They are addressed not to children alone but to families as a whole which are, as the *Stein* court noted, a natural bulwark against any coercion. Indeed, children in the family setting may hear similar invocations and benedictions at inaugurations and other public ceremonies. In short, whatever special concerns about subtle coercion may be present in the classroom setting—where inculcation is the name of the game—they do not carry over into the commencement setting, which is more properly understood as a civic ceremony than part of the educational mission.

We also recognize that modern government, for better or worse, has a far more substantial presence in the daily lives of its citizens than did the government of 1789, and thus may be capable of creating a pervasive atmosphere of conformity without resort to direct legal compulsion. Accordingly, Establishment Clause jurisprudence must remain sensitive to the manner in which new forms of governmental power could lead to indirect coercion.

Viewed in the framework we would urge this Court to adopt, the practice at issue here clearly does not violate the Establishment Clause, because it does not coerce religious exercise or bring to bear other forms of compulsion to conform. Indeed, Rabbi Gutterman's invocation and benediction, with their reference to God, do not directly or indirectly compel nonadherents to change their beliefs, but merely respect the religious heritage of the community.

We do not mean to suggest that the foregoing approach to Establishment Clause cases will necessarily make the requisite inquiry less difficult; what we do believe is that it

will better ensure that the "complicated process of constitutional adjudication" is not reduced to "a deceptive formula." *Kovacs v. Cooper*, 336 U.S. 77, 96 (1949) (Frankfurter, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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(50)
No. 90-1014

**IN THE SUPREME COURT OF THE
UNITED STATES**
October Term, 1990

ROBERT E. LEE, ET AL.,

Petitioners

v.

DANIEL WEISMAN, ETC.

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the
First Circuit

**Amicus Curiae Brief in Support of
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INTEREST OF THE AMICUS CURIAE

The *National Association of State Boards of Education* (NASBE) is a nonprofit, private association that represents state and territorial boards of education in national affairs and assists those boards in the fulfillment of their duties. NASBE's principal objectives are to strengthen state leadership in education policymaking, promote excellence in the education of all students, advocate equality of access

to educational opportunity, and assure responsible lay governance of public education.

NASBE's interest in this case arises from the extent to which confusion about the constitutionality of graduation prayer is disrupting public education. The problem is national in scope, and has resulted in bitter dissension, loss of public confidence, and great expense for the public schools. Given current conditions, the schools and society can ill afford any of those outcomes.

NASBE has not taken a position on the merits of this case; it simply seeks to have it decided. Some might ask whether the question is important enough for this Court to address at this time: the Nation will doubtless survive regardless of whether graduation prayer is held to be permissible or impermissible. NASBE questions, however, whether effective education can occur or public confidence can be maintained in many of our public school systems if the question is not decided one way or the other. School districts, school boards, and school administrators are being harassed, enmeshed in controversy, and sued regardless of the position which they adopt relative to graduation prayer. Both proponents and opponents claim the protection of the Constitution, both have been upheld by decisions of State and Federal courts, and both claim support for their respective positions in past decisions of this Court. Partisans therefore continue to wage their wars

across a defenseless public school system, inflicting serious, immediate, and irreparable harm upon those systems and, more importantly, upon the children whom they serve.

While NASBE and its member state boards of education do not express a view as to the answer which the Court should give in deciding the question itself, NASBE and its membership have a vital and compelling interest in the answer, and urge the Court to accept and decide the case. Petitioner and respondents have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The injunction issued by the United States District Court for the District of Rhode Island and upheld by the First Circuit Court of Appeals presents the issue of graduation prayer squarely as a question of the meaning of the First Amendment to the United States Constitution. There are no pendant State issues. The injunction issued by the District Court and upheld by the First Circuit simply declares graduation prayers to be unconstitutional, in violation of the First Amendment, and permanently enjoins the public schools from "authorizing or encouraging" prayer at graduation.

The opinion of the First Circuit in 1990 is in conflict with an opinion in a similar case in the Sixth Circuit which was issued in 1987. In 1980 the Second

Circuit, in dicta, endorsed a position somewhat more permissive than that taken by the Sixth Circuit, while in 1981 the Tenth Circuit, also in dicta, appeared to support the position of the First Circuit. In addition, the Sixth Circuit's requirement that permissible prayers be "civil" prayers would apparently require school officials to prescribe, or to examine and monitor, the content of those prayers, a practice rejected by the First Circuit which would also appear to violate positions taken by this Court and by the Tenth Circuit. Similar conflicts appear in decisions issued by other state and federal trial and appellate courts.

Predictably, the lack of a clear statement by the Supreme Court concerning graduation prayer, and the confusing patchwork of federal and state court decisions, has created an environment ripe for intimidation and threats of legal action against financially troubled school districts. Failure to address the issue at this time will result in continuation of litigation in several states, initiation of litigation in others, and a surrender by harried school officials to special interest groups that often appear to be less concerned with the rights and interests of children than with furtherance of their own personal objectives.

ARGUMENT: REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

A. WHICH TEST SHOULD BE FOLLOWED?

This Court has used two tests in recent years when applying the First Amendment to church-state issues: the historical analysis of *Marsh v. Chambers*, 463 U.S. 783 (1983), and the three-part analysis of *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). The Circuit Courts have issued conflicting decisions regarding both the applicability of *Marsh*, and the interpretation of *Lemon*.

1. The *Marsh* Conflict

The First Circuit's decision in the instant case regarding the constitutionality of graduation prayer under the First Amendment is in direct conflict with the Sixth Circuit's opinion in *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987). In *Stein*, the Sixth Circuit held that invocations and benedictions in public school graduation ceremonies were not necessarily precluded by the First Amendment. That holding was based upon this Court's decision in *Marsh*, 463 U.S. at 795, which rejected a challenge to daily invocations in the Nebraska legislature. The *Marsh* holding did not follow the three-part *Lemon* test, 403 U.S. at 612-613, choosing instead to

adopt an historical analysis of the practice of legislative prayer, a practice which this Court found to be "deeply embedded in the history and tradition of this country." *Marsh*, 463 U.S. at 786.

The Sixth Circuit's utilization of *Marsh* came despite statements made by this Court in *Grand Rapids School District v. Ball*, 473 U.S. 373, 383 (1985), stressing the importance of the *Lemon* test in school cases. In a case decided after the Sixth Circuit's opinion in *Stein*, see *Edwards v. Aguillard*, 482 U.S. 578, 583 n. 4 (1987), this Court again noted the importance of the *Lemon* test and also appeared to reject the use, in public school cases, of the historical approach adopted by the Sixth Circuit: "a (sic) historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted." *Id.*

The First Circuit refused to follow the Sixth Circuit's reliance on *Marsh*, see *Weisman v. Lee*, 728 F.Supp. 68, 74 (D.R.I. 1990), and 908 F.2d 1090 (1st Cir. 1990), choosing instead to follow *Lemon*. Upon finding that graduation prayer would, in its opinion, violate the second prong of the *Lemon* test, the First Circuit upheld the District Court's ban on graduation prayer. *Weisman*, 908 F.2d at 1090.

Circuit Judge Campbell argued in his dissent in the First Circuit opinion that *Marsh* may still have validity in determining the Constitutionality of graduation prayer despite this Court's apparent unwillingness to use an historical analysis in public school cases, *Weisman*, 908 F.2d at 1098 (Campbell, C.J., dissenting). Judge Campbell argued that graduation ceremonies could be considered to be public meetings, so that graduation prayer would be more closely analogous to legislative prayer than school prayer.

Graduation services do have an historical context, pre-dating the establishment of public schools and stretching back several hundreds of years to what was unquestionably a religious beginning (even the "mortar board" caps and long gowns traditionally worn by graduates are simply adaptations of similar clerical robes worn during previous centuries¹). If graduation

¹ An interesting discussion of the origin of the graduation robes may be found in a commencement speech given by Dr. Hugh Nibley, Professor of Ancient Studies, Brigham Young University, on August 19, 1983. His comments included the following: "[t]hese robes originally denoted those who had taken clerical orders, and a college was a 'mystery' with all the rites, secrets, oaths, degrees, tests, feasts, and solemnities that go with initiation into higher

services are something apart from the normal course of events in the public schools, as Circuit Judge Campbell suggests, then previous statements by this Court regarding prayer in schools ["There can be little doubt that the District Court was correct in finding that conducting prayers as part of a school program is unconstitutional under this Court's decisions." Justice POWELL in his capacity as Circuit Justice for the Eleventh Circuit, in *Jaffree v. Board of School Commissioners of Mobile County*, 459 U.S. 1314, 1315 (1983), quoted in *Wallace v. Jaffree*, 472 U.S. 38, 45, n. 25 (1985)], may not be applicable, and prayer could perhaps be continued at the option of local school authorities as a reasonable accommodation of an historical practice. As is apparent in the Sixth Circuit's opinion in *Stein*, and in Circuit Judge Campbell's dissent in the instant case, the question of the relationship of graduation services to the public schools, and the question of the applicability of the *Marsh* historical analysis, are still open, are still troubling, and are still incapable of resolution by local school officials until this Court speaks.

2. The *Lemon* Conflict

knowledge." He then proceeded to trace the origin of the robes, and to some extent the ceremonies, back through the early Christian Church to the Roman Empire and beyond.

The graduation prayer dilemma would not be resolved for local school officials even if this Court were to clearly eliminate recourse to the *Marsh* analysis in such cases. The First Circuit's holding in the instant case sustained the invalidation of graduation prayer on the basis of the *Lemon* test, claiming that "[t]he special occasion of graduation coupled with the presence of prayer creates an identification of governmental power with religious practice." *Weisman*, 728 F.Supp. at 73; 908 F.2d at 1090. A statement by the Second Circuit in dicta, given in a case applying the *Lemon* test to another issue, found no such conflict: "where a clergyman briefly appears at a yearly high school graduation ceremony, no image of official state approval is created." *Brandon v. Board of Ed.*, 635 F.2d 971, 979 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981), reh'g denied, 455 U.S. 983 (1982). And the Tenth Circuit, speaking in dicta in a case which involved the application of the *Lemon* test to released time religious instruction, stated, "It is clear, however, that public schools are prohibited from engaging in activities which are essentially religious, religiously ceremonial, or worship-like, such as the recitation of prayer or scripture," *Lanner v. Wimmer*, 662 F.2d 1349, 1354 (10th Cir. 1981).

The First and Second Circuits are not alone in their dispute concerning the correct application of *Lemon* to

graduation prayer; similar conflicts exist among other federal and state trial courts, *cf Bennett v. Livermore Unified School Dist.*, 238 Cal.Rptr. 819, 824, (Cal.App. 1 Dist. 1987): "We therefore conclude that the State action at issue violates all three parts of the *Lemon* test, and hold that the inclusion of a religious invocation at a high school graduation violates the First Amendment" (emphasis in original), and *Sands v. Morongo Unified School Dist.*, 262 Cal.Rptr. 452 (Cal.App. 4 Dist. 1989), review granted, 782 P.2d 1139 (Cal. 1989) (holding that the *Lemon* test is not violated by a nonsectarian graduation prayer). School officials and their legal advisors are thus adrift in a sea of speculation, guided by a spinning compass.

B. REGULATING THE CONTENT OF PRAYERS

While holding that graduation prayer is not *per se* unconstitutional, the Sixth Circuit invalidated the particular prayers given, since they "employ[ed] the language of Christian theology and prayer. Some expressly invoke[d] the name of Jesus as the Savior." *Stein*, 822 F.2d at 1410. Limiting acceptance of graduation prayer to "nonsectarian" prayer has also been endorsed by a California Court of Appeal, *Sands*, 262 Cal.Rptr. at 461.

In the instant case, the Providence School Committee took pains to distribute a pamphlet entitled "Guidelines for Civic

Occasions," which included suggestions for composing a non-sectarian prayer. The school principal also advised the person who gave the invocation and benediction at the middle school that the prayers should be nonsectarian, *Weisman*, 728 F.Supp. at 69. Despite the fact that the District Court found the prayers to be "examples of elegant simplicity, thoughtful content, and sincere citizenship," *id.*, n. 2, the prayers were found to violate the second prong of the *Lemon* test because they included an appellation to a deity. *Id.* at 72. The District Court based its rejection of even nondenominational prayer upon this Court's decision in *Engel v. Vitale*, 370 U.S. 421, 430 (1962), "[T]he fact that the prayer may be denominationally neutral ... [cannot] serve to free it from the limitations of the Establishment Clause."

A requirement that prayers be non-sectarian or non-denominational would appear to require at a minimum that school officials adopt a policy regulating the content of prayers. Under *Stein*, 822 F.2d at 1410 that would appear to include elimination of any references to a given religion's theology or the use of a given religion's prayer format, and would require instead the establishment of the format and language of a court-approved form of religion, the "American Civil Religion." *Id.* at 1409, *Marsh*, 463 U.S. at 793, n. 14. If an invocation or benediction were to be permitted under the District Court's opinion in the

instant case, it would even appear to be necessary to eliminate any reference to a deity, along with use of the word, "amen." *Weisman*, 728 F.Supp. at 69 and 72.

Requirements that school districts become religious censors, exercising prior restraint to ensure that prayers are in conformity with the established form of the "American civil religion," are in sharp conflict with a decision of the Tenth Circuit and appear to be in violation of the opinion of this Court as expressed in *Marsh*, despite the Sixth Circuit's citation to that case, see *Stein*, 822 F.2d at 1409, in its "civil" invocation requirement. The Tenth Circuit, in invalidating a rule of the Utah State Board of Education that prohibited the granting of high school graduation credit for church-sponsored courses taught in a released-time program if those courses were "mainly denominational" in content, *Lanner*, 662 F.2d at 1360, held that "a purely religious test for determining what is not 'mainly denominational,' and therefore credit worthy, is not to be left to the state." *Id.* at 1361. A similar sentiment is expressed in *Marsh*, where this Court noted that "it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer," *Marsh*, 463 U.S. at 795, and in *Widmar v. Vincent*, 454 U.S. 263, 272, n. 11 (1981): "[T]he University would risk greater 'entanglement' by attempting to enforce its exclusion of

'religious worship' and 'religious speech.'"

Many NASBE members have attempted to address the issue of religious pluralism and the First Amendment by encouraging local officials responsible for planning graduation ceremonies to rotate opportunities for giving invocations and benedictions among the various groups of believers and non-believers in their respective communities, on the basis that "secondary students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Board of Education of the Westside Community Schools v. Mergens*, 495 U.S. ___, ___, 110 L Ed 2d, 191, 216 (1990). It is clear, however, as shown by the efforts of the Providence, Rhode Island School Committee, *Weisman*, 728 F.Supp. at 69, that others among this country's lay boards of education, in their efforts to conform with what they see as the rule of the Constitution as interpreted by *Stein*, *Sands*, and similar cases, are embarking on "sensitive evaluation[s]" and commencing to "parse the content" of prayers offered as part of graduation ceremonies in an effort to avoid the symbolic placement of the government's official seal of approval on one religious view, *Stein*, 822 F.2d at 1409, *Marsh*, 463 U.S. at 792. Should there not, however, be equal concern about the symbolic effect of government entangling itself by acting to amend or delete words

and phrases in something as personal and inherently religious as prayer? NASBE is concerned about the implications of assigning any such activity to lay boards of education or school officials.

II. THE CONTROVERSY AMONG THE COURTS IS CONTRARY TO PUBLIC POLICY, INTERFERES WITH PROPER SCHOOL GOVERNANCE, AND IMPOSES UNREASONABLE COSTS UPON LOCAL SCHOOL SYSTEMS

As noted in the Petitioners' *Petition for a Writ of Certiorari*, p.14 n. 15, there have been at least seven published cases regarding graduation prayer since 1980, four of which have reached the appellate level. That number does not accurately reflect the true number of cases actually decided, however, since it ignores cases decided in state trial courts and not appealed. In addition, the number does not reflect cases filed but settled out of court, those currently in litigation, or those which are threatened but not filed because the affected school district has conceded on the issues to avoid litigation.

NASBE and its member state boards of education do not, as a general rule, maintain records of litigation in school districts. According to reports received by NASBE during the preparation of this brief, however, it appears that suits are presently pending in at least six states: California, Hawaii, Idaho, Pennsylvania, Utah, and Wyoming. Several other suits,

including two in Wyoming, two in Idaho, one in Utah, and one in Oregon, were reported to have been dropped within the last two years in response to the defendant school districts' agreement to ban graduation prayer. One suit, *Randall J. Vaughn et al. v. Washington County School District*, No. 90-C-430W (D.Ut. 1990), seeking permission to hold prayer as part of a graduation service was dropped in Utah in response to the defendant school district's agreement to review the matter in a public hearing each year prior to graduation.

Despite the fact that a definitive answer has not been given by this Court concerning the issue of graduation prayer, school boards facing tight budgets, crowded classrooms, and inadequate textbooks are increasingly unwilling to commit district funds to a defense of graduation prayer, deciding instead to simply yield to the threats of prayer opponents by banning prayer. The school board in Big Horn County, Wyoming, for example, decided in November, 1990 to drop graduation prayer rather than pursue a defense of a suit, *Commers v. Big Horn School District No. 1*, No. C-90-189J (D.Wy. 1990), stating that taxpayers' money would be "better spent on educating children than litigation on religious issues." *Casper (Wyoming) Star-Tribune*, Nov. 21, 1990, p. A1. A similar course was followed in *Brown v. Rockland School District No. 22*, No. 89-4116 (D.Id. 1989), settled by Consent Decree on May 23, 1990, and *A.E.M. v. Board of*

Education of Jordan School District, No. C-89-538S (D.Ut., 1989). The decision in such cases is not, therefore, one reached through a discussion on the merits by the elected local policymakers in the affected school districts; it is rather a decision imposed by partisans using the financial burdens of the litigation process to coerce a decision.

Simply stopping the practice of graduation prayer, absent a definitive decision by this Court, will not stop the controversy or financial loss, however. School districts in Iowa, *Lundberg v. West Monona Community School District*, 731 F.Supp. 331 (N.D.Iowa 1989), and Utah, *Randall J. Vaughn, et al. v. Washington County School District*, No. 90-C-430W (D.Ut., 1990) were sued for barring the practice of graduation prayer. A similar case is currently being pursued against the Utah State Board of Education, *Campbell, et al. v. Utah State Board of Education*, No. 90-0503333 (Ut. 5th Dist. 1990). In some cases, board members have been advised that failure to stop the practice of graduation prayer may result in legal action against individual board members and personal financial liability, *Lundberg*, 731 F.Supp. at 335. In both the Iowa (*id.*) and Utah² school district

² Letter dated August 27, 1990 from Warren Grames, Claims Manager, Utah State Division of Risk Management, to John W. Palmer, Attorney for the Washington

cases, local boards were also advised that insurance carriers would not defend suits involving graduation prayer, and that costs incident to any such defense would be the sole responsibility of the affected school districts. In the *Vaughn* case, in which the defendant school district was sued for stopping graduation prayer, District Superintendent Steven H. Peterson reported to the Utah State Office of Education that the insurance carrier's decision resulted in legal costs to the school district in excess of \$12,000.

It has now been some eighteen years since the first published graduation prayer case, *Wood v. Mt. Lebanon Township School District*, 342 F.Supp. 1293 (W.D. Pa. 1972), was reported. Despite that passage of time and a number of cases on point, courts have given little reliable guidance for local school officials to follow in addressing such issues. The result has been governance by intimidation, a strange outcome for an issue centered in the First Amendment. If it be true, as this Court has previously stated, that "[t]oday, education is perhaps the most important function of state and local governments,"

County School District: "Our policy with the Washington County School District does not provide coverage for this particular type of action. For that reason, any settlement or legal billing directed to us will be rejected."

Brown v. Board of Education, 347 U.S. 483, 493 (1954), then it would appear to be contrary to public policy to allow the current situation to continue.

III. THE INSTANT CASE IS WELL SUITED TO RESOLUTION OF THE PRIMARY ISSUES IN THIS LINE OF CASES

As noted above, financial and other considerations have resulted in litigants bringing relatively few graduation prayer cases through to decision, and fewer still to appeal. Most of the cases have been filed on both state and federal grounds, including all other cases currently pending, according to information reported to NASBE officials. Despite the claimed state grounds, the published decisions, without exception, devote primary analysis to First Amendment issues and there does not appear to be any significant effort to construct a strong body of independent state law. Nevertheless, inclusion of state grounds in a suit makes it difficult to pursue a definitive resolution of the federal issues. The instant case has avoided those difficulties. It is presented solely as a question of First Amendment interpretation, *Lee v. Weisman*, "Petition for a Writ of Certiorari", p. i, enabling this Court to address that issue squarely and definitively.

CONCLUSION

For the foregoing reasons, the

National Association of State Boards of Education respectfully requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit be granted in case no. 90-1014, *Robert E. Lee, et al., v. Daniel Weisman, Etc.*, and the case be set for plenary review.

Respectfully submitted,

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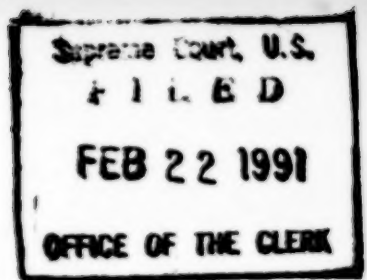
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(5)
No. 90-1014



—
In the

Supreme Court of the United States

October Term, 1990

—
Robert E. Lee, et al.,
Petitioners,

v.

Daniel Weisman, et al.,
Respondents.

—
ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

—
BRIEF AMICUS CURIAE OF
NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

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No. 90-1014

In the
Supreme Court of the United States
October Term, 1990

Robert E. Lee, et al.,
Petitioners,

v.

Daniel Weisman, et al.,
Respondents.

BRIEF AMICUS CURIAE OF
NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS

This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards

associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

REASONS FOR GRANTING THE WRIT

The practice of holding invocations before high school graduation has been a tradition in this country's public high schools since their inception. The conflict in the lower courts together with the perceived conflict between this Court's school prayer decisions on the one hand and decisions such as Marsh v. Chambers, 463 U.S. 783 (1983), on the other, leave schools on the horns of a dilemma. On the one hand, should they follow tradition and risk a lawsuit or on the other, follow the safer legal ground and

risk the profound displeasure of a majority of their constituents who argue, whether rightly or wrongly, that U.S. Supreme Court decisions do not require the elimination of invocations and benedictions from graduation ceremonies.

ARGUMENT

Introduction.

For many years, NSBA has had a standing policy supporting the constitutional principle of the separation of church and state. In addition, NSBA's current resolution on prayer and silent meditation in public schools states:

NSBA opposes state and federally mandated prayer or silent meditation in the public schools.

On the question of invocations at high school graduations, however, school boards are not of one mind. Some believe that non-denominational inspirational messages at graduations where parents are present do not raise questions of separation of church and state and, indeed, add an appropriate

solemnity to the proceedings. Others believe that this Court's prayer decisions require a result similar to that below and further believe that, as a matter of policy, invocations should appropriately be left in the churches. Because of this philosophical disagreement among its members, NSBA will not take a position on the merits of this case in the event that the Court agrees to hear the issue. However, Amicus does distance itself from the arguments in the Petitioners brief to the extent the analysis calls into question this Court's decisions concerning the use of public resources or personnel. See, e.g., Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1973). Amicus believes that this Court could reach a decision favorable to Petitioners without necessarily agreeing with Petitioners' substantive analysis.

Regardless of the lack of consensus on the merits, however, NSBA's members agree that there is a need for clarity in this area which can only be provided by a decision by this Court on the issue. Wherever particular school boards might stand on the substantive issue, they agree that the public expects the tradition of graduation invocations to continue in the absence of clear case law to the effect that the practice is unconstitutional. That clarity does not exist.

I. Invocations and benedictions at graduation ceremonies are a widespread tradition in public high schools.

Graduation day signifies more to the graduate and his or her family than the day diplomas are distributed.

Commencement is an impressive and memorable occasion in every secondary school in the United States. It represents the achievement of a goal that students, their parents, and their teachers have worked long and hard to attain. The ritual that surrounds the commencement ceremony bespeaks the

significance and dignity Americans place on this very important moment in the life of every student who graduates.

Owen B. Kiernan, Forward to NASSP Commencement Manual, Seventh Revised Edition (1975) (hereinafter Commencement Manual).

High school graduation exercises in this country have remained much the same for many years. The solemnity of the occasion has called for a tradition of dress, program substance and ceremony, which includes an invocation and a benediction.

The Commencement Manual reproduced the commencement program for a high school in Norwich, Connecticut held on July 21, 1868. The program in Norwich differed from the type of program one would see today with its inclusion of speeches on subjects such as "True Manliness" and "Women's Sphere and Rights" and a "prayer," but other features of that 1868 commencement remain much the same today -- particularly the invocation. Just as

in 1868, the typical high school commencement program today includes an invocation, some kind of student participation, music, commencement address(es), announcement of awards and presentation of diplomas. One major difference between graduation ceremonies in 1868 and current exercises is the site; in 1868 graduation exercises were usually held in a church, rather than on school property as they often are today. The religious location may have led to the practice of holding baccalaureate services in conjunction with graduation.

According to a 1974 study conducted by the NASSP, 61 percent of the reporting schools in that year held baccalaureate services. Commencement Manual, at 43. Attendance at the service was mandatory in 31 percent of those schools. Schools that held a baccalaureate conducted it in a variety of places including schools, civic auditoriums, outdoor stadiums and churches. The NASSP report cited the case

of Wiest v. Mt. Lebanon S.D., 457 Pa. 166, 820 A.2d 302, cert. denied, 419 U.S. 967 (1974), for the proposition that baccalaureate services passed muster under both the establishment and free exercise clauses because they "would not have any coercive effect upon appellants in the practice of their religion."

The NASSP manual does not discuss the legality of invocations probably because it had not yet been raised as a problem in 1974. Every commencement program shown in the report included an invocation and the discussion by an expert also included an invocation as part of the "typical" graduation exercise. G.K. Stewart, "Reflections from a Commencement Speaker," Commencement Manual, at 18-19.

Some schools still hold a formal baccalaureate service, but others leave that activity to the local churches, depending on parental and student attitudes toward the holding of a service. However, both the

invocation led by local clergy and the benediction also led by local clergy continue to be included as features in the typical graduation ceremony. NASSP, "Commencement -- Planning the Graduation Exercises," The Practitioner, Vol. XII, No. 2, at 6 (December 1985).

Prior to this Court's school prayer decisions, Engel v. Vitale, 370 U.S. 421 (1962), Abington v. Schempp, 374 U.S. 203 (1963); Stone v. Graham, 449 U.S. 39 (1980); Wallace v. Jaffree, 472 U.S. 38 (1985), most public high schools, particularly in the South, held Christian baccalaureate services before graduations. After these decisions, many schools discontinued the practice of holding such services and began using instead ecumenical invocations, in the belief that these pronouncements solemnize the occasion but assure that no student feels alienated from the process.

After the prayer decisions, a great deal of dismay arose in particular areas of the country about the Court's action. After Schempp, the Congress even held hearings on the matter in response to proposed amendments to the Constitution relating to school prayer. In other quarters, the decisions were resoundingly endorsed by many school board members and other school officials:

Nothing in the Court's ruling removes from the schools the freedom and the obligation to treat religion as a very large force in our civilization. Nothing in the ruling suggests that teachers and children must pretend to be agnostics between the opening and closing bells.

The Constitution now forbids ritual. It insures freedom for all individuals, pupils and teachers, to exercise their private beliefs, short of ritual, different though those beliefs may be. Let us not change it.

Hearings on Proposed Amendments to the Constitution Relating to Prayers and Bible Reading in the Public Schools Before the Committee on the Judiciary House of Representatives (Testimony of Sidney P.

Marland, Jr., then Superintendent of Schools, Pittsburgh, Pa., later U.S. Commissioner of Education, Department of Health, Education and Welfare), 88th Cong. 2d Sess. 1458 (1964) (hereinafter, Hearings).

Yet even in school districts in favor of the school prayer decisions, invocations continued to be a part of the typical graduation ceremony although changes were made in their format. Many school boards made a number of changes in their practices: the invocations are required to be non-denominational, some schools choose student leaders to write and deliver the invocations and in others, the ceremonies are led by religious leaders on a rotating basis so that preference is never given to any particular religion, students are allowed to opt out of the graduation and as always, parents and friends are in attendance. The 1975 NASSP report noted that graduation attendance requirements in general have become more

relaxed with only 56 percent of schools requiring graduating students to attend. Today, most high school graduation ceremonies are offered on a voluntary basis.

II. Current case law does not provide clear guidance to school districts on the constitutionality of graduation invocations and benedictions.

Until the recent lower court decisions were rendered, school boards believed that their policies regarding invocations did not contravene this Court's school prayer decisions.

This feeling may have been based on a widespread perception, whether right or wrong, that this Court's school prayer decisions do not apply in the context of a public event such as a high school graduation. This perception probably derived from a substantial amount of case law, which arguably may be in error but nevertheless exists.

In Brandon v. Board of Educ. of Guilderland Cent. Sch., 635 F.2d 971, 979 (2d

Cir. 1980), ruled that allowing student prayer groups violates establishment of religion principles (a proposition overturned by this Court in the case of Westside Community High School v. Mergens, 110 S.Ct. 2356 (1990)), but the court in dictum distinguished the practice of a "clergyman briefly appear[ing] at a yearly high school graduation ceremony [where] no image of official state approval is created." In Grossberg v. Deusebio, 380 F. Supp. 285, 288 (E.D. Va. 1974) the court noted that "invocations similar to those at issue here have dotted our history from our country's inception. Invocations are commonplace in the legislative chambers of both state and federal government and at celebrations of public holidays such as Thanksgiving and Memorial Day." The opinion in Grossberg, decided before Marsh v. Chambers and Lemon v. Kurtzman, 403 U.S. 602 (1971), held that the practice of holding high school invocations did not have a religious purpose

or effect. The case cites three other decisions which found invocations in public ceremonies permissible -- Wiest v. Mt. Lebanon School District, supra, Lincoln v. Page, 109 N.H. 30, 241 A.2d 799 (1968), and Wood v. Mt. Lebanon Township School Dist., 342 F.Supp. 1293 (W.D. Pa. 1972).

Two more recent cases have reached similar results. In Sands v. Morongo Unified School District, 262 Cal. Rptr. 452 (Cal. Ct. App. 4th Dist. 1989), review granted, 264 Cal. Rptr. (Cal. Sup. Ct. 1989), the California court of appeals upheld the practice of conducting high school invocations and in Stein v. Plainwell Community Schools, 822 F.2d 1406 (6th Cir. 1987), the Sixth Circuit Court of Appeals held that Marsh v. Chambers applies to high school invocations.

The practice of holding invocations and benedictions is not limited to states that had, prior to this Court's school prayer decisions, a tradition of prayer in the

schools. California, for example, has never had a history of prayer in the schools. In 1964 the Committee on the Judiciary of the House of Representatives held hearings on proposed amendments to the Constitution relating to prayers and Bible reading in the public schools. The then-President of the California State Board of Education Thomas W. Braden testified against the amendments, stating "the members of our board believe that our teachers are competent to distinguish between teaching about religion and conducting compulsory worship." Mr. Braden testified that to his knowledge, prior to the Supreme Court's decision in Engel v. Vitale in 1962 no public school in California had the practice of reciting prayers or reading of the Bible in any public school. Hearings, at 1500.

In 1989 in the Sands case the California Court of Appeals had occasion to review the apparently long-standing practice of conducting invocations and benedictions at

several high schools in San Bernardino County. These California schools, like most other schools across the country, did not perceive the practice of invocations at a public ceremony as analogous to the reciting of prayers in the classroom. The court held that Marsh v. Chambers does not apply to the schools, but nevertheless, the use of invocations is constitutional because it meets the three-pronged test of Lemon v. Kurtzman.

However, a number of other courts have overturned the practice of using invocations before graduation ceremonies, putting school boards in a quandary as to their graduation practices. See, e.g., Lundberg v. West Monona Community School Dist., 731 F. Supp. 331 (N.D. Iowa 1989) (denied preliminary injunction to students and parents who wanted to compel school to include public prayer in graduation ceremony); Graham v. Central Community School Dist., 608 F. Supp. 531 (S.D. Iowa 1985); Doe v. Aldine Indep. School Dist., 563 F.Supp. 883

(S.D.Tex. 1982); Bennett v. Livermore Unified School Dist., 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987); Kay v. David Douglas School Dist., 79 Or. App. 384, 719 P.2d 875 (1986), rev'd on other grounds, 303 Or. 574, 738 P.2d 1389 (1987), cert. denied, 484 U.S. 1032.

Then in 1990 this Court decided Westside Community Schools v. Mergens, upholding the constitutionality of the Equal Access Act's requirement that a school that allows any noncurriculum related student club to meet during noninstructional time must allow all student clubs -- including religious clubs -- to meet on the same terms and conditions.

The Court did not address the issue of school sponsored prayer and, in fact, at least one of the concurrences expressed grave concerns about how school districts should implement the Equal Access Act without appearing to sponsor religious activities. Nevertheless, since Mergens there has been a wide public perception among school officials,

parents and students that Mergens constituted a chink in the armor of the Court's prayer in the schools decisions. For example, the headlines in several newspapers characterized Mergens as a school prayer case. An Associated Press story in the Baltimore Evening Sun stated, "Fundamentalists cheer high court's school-prayer ruling." The headline in the Oneonta, New York Daily Star read, "Prayer groups allowed to worship at school." The San Diego Tribune "Public-school prayer groups gain Supreme Court blessing." The Boca Raton, Florida News informed its readers, "Court OKs school prayer clubs."

The misperception that Mergens grants students the right to engage in religious activities at school, other than the right of access to school facilities permitted to other noncurriculum related student groups, is being perpetuated by certain Christian advocacy groups. For example, Jay Alan Sekulow, General Counsel for Christian Advocates

Serving Evangelism (C.A.S.E.) (and counsel for respondents in Mergens) has asserted that "the 'wall of separation' between church and state has begun to crumble . . . [T]he Mergens case has opened up high schools for [gospel] tract distribution." J. Sekulow, "Running the Race," C.A.S.E. (1990). Sekulow opines that "in Mergens the Court reinforced students' rights to evangelize on the high school campus." "A Field for the Harvest," C.A.S.E. (1990). Predicting that "distribution of Christian literature will be the legal issue of the 1990's" St. Petersburg Times, Sept. 22, 1990, Sekulow has already been involved in at least one case challenging school officials' decision to bar dissemination of Christian literature.

In the face of such interpretations of Mergens and other court decisions, school officials must formulate policy concerning not only distribution of religious literature but also the use of invocations and benedictions

at graduation ceremonies. Clearly, guidance from this Court is needed so that schools can ensure that their practices do not overstep constitutional bounds.

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(10)
-No. 90-1014

Supreme Court, U.S.

FILED

MAY 24 1991

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1990

ROBERT E. LEE, ET AL.,

Petitioners,

v.

DANIEL WEISMAN, ETC.,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The First Circuit

JOINT APPENDIX

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**Petition For Certiorari Filed December 21, 1990
Certiorari Granted March 18, 1991**

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RELEVANT DOCKET ENTRIES

Weisman, etc. v. Lee, et al.

No. 89-0377B

United States District Court for
the District of Rhode Island

6/16/89 Complaint

6/16/89 Affidavit of Daniel Weisman

6/26/89 Answer of Defendants

1/9/90 District Court Opinion (reprinted in Appendix B to
the Petition For Writ of Certiorari at 18a-30a)

Weisman, etc. v. Lee, et al.

No.90-1151

United States Court of Appeals
for the First Circuit

3/16/90 Brief and Appendix of Appellant

3/28/90 Brief of National Legal Foundation as Amicus Cur-
iae in Support of Appellant

4/20/90 Brief of B'Nai B'Rith as Amicus Curiae in Support
of Appellee

4/20/90 Brief of Appellee

5/10/90 Oral argument before Judges Campbell, Torruella,
and Bownes

7/23/90 Court of Appeals⁴ Opinion (reprinted in Appendix A
to the Petition For Writ of Certiorari at 1a-17a)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DANIEL WEISMAN, personally and as
next friend of DEBORAH WEISMAN

v.

C.A.No. 89-0377B

ROBERT E. LEE, individually and as
principal of THE NATHAN BISHOP
MIDDLE SCHOOL, et al.

AMENDED VERIFIED COMPLAINT

I. JURISDICTION

1. This is a civil action brought under 42 USC §§ 1983 and 1988 by Plaintiffs to secure injunctive relief against the inclusion of prayer in the graduation ceremonies held in and/or sponsored by the various public schools in the City of Providence and to secure declaratory judgment that inclusion of prayer in public school graduation ceremonies in the City of Providence violates First and Fourteenth Amendments of the United States Constitution, and Article 1, § 3 of the Rhode Island Constitution.

2. This Court has jurisdiction of the matter in controversy pursuant to 28 USC §§ 1331, 1343, 2201, and 2202, as well as this Court's pendent and ancillary jurisdiction.

II. PARTIES

A. PLAINTIFFS

3. Plaintiff DANIEL WEISMAN is now and at all times pertinent hereto has been a resident and taxpayer of the City of Providence, State of Rhode Island and the United States of America. Plaintiff regularly pays taxes which finance the operation of city schools.

4. Plaintiff DANIEL WEISMAN is the father and next friend of Deborah Weisman, age 14 who graduated from the

eighth grade at the Nathan Bishop Middle School in June, 1989, and who will attend Classical High School, a public high school in the City of Providence, in September, 1989.

B. DEFENDANTS

5. Defendant ROBERT E. LEE is now and at all times pertinent hereto has been the principal of the Nathan Bishop Middle School, and as such is the administrator of said school. Defendant ROBERT E. LEE is sued herein individually and in his official capacity.

6. Defendant THOMAS MEZZANOTTE is now and at all times pertinent hereto has been the principal of Classical High School, and as such is the administrator of said school. Defendant THOMAS MEZZANOTTE is sued herein individually and in his official capacity.

7. Defendant JOSEPH ALMAGNO is now and at all times pertinent hereto has been the superintendent of the Providence public schools, including but not limited to the Nathan Bishop Middle School and Classical High School, and as such is responsible for the overall administration of the Providence public schools and of the policies of the Providence School Committee. Defendant JOSEPH ALMAGNO is sued herein individually and in his official capacity.

8. Defendants VINCENT McWILLIAMS, ROBERT DeROBBIO, MARY BATASTINI, ALBERT LEPORE, ROOSEVELT BENTON, MARY SMITH, ANTHONY CAPRIO, BRUCE SUNDLUN, and ROBERTO GONZALEZ are now and at all times pertinent hereto have been members of the Providence School Committee and as such are responsible for the policies and operation of the Providence public schools, including but not limited to the Nathan Bishop Middle School and Classical High School. Defendants VINCENT McWILLIAMS, ROBERT DeROBBIO, MARY BATASTINI, ALBERT LEPORE, ROOSEVELT BENTON, MARY SMITH, ANTHONY CAPRIO, BRUCE SUNDLUN, and ROBERTO

GONZALEZ are sued herein individually and in their official capacity.

9. Defendants herein have at all times pertinent hereto been acting under color of state law.

III. STATEMENT OF FACTS

10. The Providence School Department, acting as an agency of the City of Providence and the State of Rhode Island, under the authority and control of the Defendant members of the Providence School Committee are now and at all times pertinent hereto owners of the public schools located in the City of Providence and of all equipment located therein.

11. The Defendant members of the Providence School Committee and Superintendent of Schools sponsor, each year in the month of June, graduation ceremonies for the middle schools and high schools operated as public schools in the City of Providence.

12. The Defendant members of the Providence School Committee and the Superintendent of Schools allow, permit, authorize and/or direct, as part of their official policy, the various public schools in the City of Providence to include in their respective graduation ceremonies, invocations and benedictions in the form of prayer.

13. By information and belief, in accordance with the official policy of the Defendant members of the Providence School Committee and the Superintendent of Schools, some but not all of the public middle schools and high schools located in the City of Providence have included and continue to include invocations and benedictions in the form of prayer in their graduation ceremonies.

14. The graduation ceremony for the eighth grade class of the Nathan Bishop Middle School, which class included

Deborah Weisman, was held on the morning of June 20, 1989, on school grounds.

15. The graduation ceremony of the Nathan Bishop Middle School included an invocation and benediction in the form of prayer, performed by a Jewish rabbi.

16. By information and belief, the graduation ceremony of Classical High School, also held in June, 1989, on school grounds, likewise included an invocation and benediction in the form of prayer.

17. By information and belief, it is the policy and practice of Defendants to include an invocation and benediction in the form of prayer in the graduation ceremonies which take place each year at Classical High School.

18. By information and belief, graduating eighth grade students were expected to attend the graduation ceremony at Nathan Bishop Middle School.

19. Parents and friends of graduating eighth grade students of Nathan Bishop Middle School, and graduating twelfth grade students of Classical High School, are invited to attend the schools' graduation ceremonies.

20. Plaintiff DANIEL WEISMAN is opposed to and offended by the inclusion of prayer in the public school graduation ceremony of his child both at the middle school and the high school level.

21. Municipal and state tax funds are used to operate and maintain the Providence public schools and to fund their graduation ceremonies.

22. Plaintiff DANIEL WEISMAN is opposed to the expenditure of his tax funds for school ceremonies which include prayer.

23. Plaintiff has no adequate remedy at law and he and his child will suffer irreparable harm by the policy of Defendants to allow and/or authorize the inclusion of prayer in the Providence public school graduation ceremonies.

24. Defendants will not be harmed by the issuance of an injunction preventing the including of prayer in the Providence public school graduation ceremonies.

25. Plaintiff DANIEL WEISMAN is likely to succeed on the merits of his complaint, as is set forth more fully herein, and in the accompanying memorandum.

IV. FIRST CAUSE OF ACTION

26. Plaintiff DANIEL WEISMAN hereby incorporates paragraphs 1 through 25 above and for his first cause of action allege that the inclusion of prayer in the graduation ceremonies of the Providence public schools violates the Establishment Clause of the First and Fourteenth Amendments of the United States Constitution.

V. SECOND CAUSE OF ACTION

27. Plaintiff DANIEL WEISMAN hereby incorporates paragraphs 1 through 25 above and for his second cause of action allege that the inclusion of prayer in the graduation ceremonies of the Providence public schools violates Article 1, § 3 of the Rhode Island Constitution.

WHEREFORE, Plaintiff DANIEL WEISMAN prays:

1. For a declaratory judgment that the inclusion of prayer in the Providence public school graduation ceremonies violates the Establishment Clause of the First and Fourteenth Amendments of the United States Constitution, as well as Article 1, § 3 of the Rhode Island Constitution.

2. For a temporary and permanent injunction forbidding Defendants and all persons acting under or through them to

authorize or allow the inclusion of prayer in the Providence public school graduation ceremonies.

3. For reasonable attorneys fees and costs for the prosecution of the within action.

4. For such other and further relief as this Court deems just and proper.

Plaintiffs
By his Attorneys

/s/ _____
SANDRA A. BLANDING, ESQUIRE
REVENS & DELUCA LTD.
946 Centerville Road
Warwick, RI 02886
(401) 822-2900

Dated: 7/28/89

SANDRA A. BLANDING IS DESIGNATED AS TRIAL COUNSEL.

I, DANIEL WEISMAN, first being duly sworn, on oath, depose and say that I have read the foregoing complaint and that it is true to the best of my knowledge and belief.

/s/ _____
DANIEL WEISMAN

[Jurat Omitted In Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Caption Omitted In Printing]

ANSWER OF DEFENDANTS TO
AMENDED COMPLAINT

1. Defendants admit the allegation as stated in Paragraph 1 relative to jurisdiction.
2. Defendants admit the allegation as stated in Paragraph 2 relative to jurisdiction.
3. Defendants neither admit nor deny the allegation contained in Paragraph 3 and leave Plaintiff to his proof.
4. Defendants neither admit nor deny the allegation contained in Paragraph 4 and leave Plaintiff to his proof.
5. Defendants admit the allegation contained in Paragraph 5.
6. Defendants admit the allegation contained in Paragraph 6.
7. Defendants admit the allegation contained in Paragraph 7.
8. Defendants admit the allegation contained in Paragraph 8.
9. Defendants admit the allegation contained in Paragraph 9.
10. Defendants admit the allegation contained in Paragraph 10.
11. Defendants admit the allegation contained in Paragraph 11.
12. Defendants neither admit nor deny the allegation contained in Paragraph 12 and leave the Plaintiff to his proof.
13. Defendants neither admit nor deny the allegation contained in Paragraph 12 and leave the Plaintiff to his proof.

14. Defendants admit the allegation contained in Paragraph 13.
15. Defendants admit the allegation contained in Paragraph 14.
16. Defendants neither admit nor deny the allegation contained in Paragraph 16 and leave the Plaintiff to his proof.
17. Defendants neither admit nor deny the allegation contained in Paragraph 17 and leave Plaintiff to his proof.
18. Defendants neither admit nor deny the allegation contained in Paragraph 18 and leave the Plaintiff to his proof.
19. Defendants neither admit nor deny the allegation contained in Paragraph 19 and leave the Plaintiff to his proof.
20. Defendants neither admit nor deny the allegation contained in Paragraph 20 and leave the Plaintiff to his proof.
21. Defendants admit the allegation contained in Paragraph 21.
22. Defendants neither admit nor deny the allegation contained in Paragraph 23 and leave the Plaintiff to his proof thereof.
23. Defendants neither admit nor deny the allegation contained in Paragraph 23 and leave the Plaintiff to his proof.
24. Defendants neither admit nor deny the allegation contained in Paragraph 24 and leave the Plaintiff to his proof.
25. Defendants deny the allegation contained in Paragraph 25.
26. Defendants hereby incorporate their answers to Paragraphs 1 to 25 above and deny all other allegations contained in Paragraph 26.
27. Defendants hereby incorporate their answers to Paragraphs 1 through 27 above and deny all other allegations contained in Paragraph 27 of the Plaintiff's Complaint.

WHEREFORE, Defendants pray that Plaintiff's Complaint be denied and dismissed and that Defendants be

awarded judgment for Defendant, attorney's fees, interest and costs and such other and further relief as this Honorable Court deem just and proper.

Defendants,
By their attorney,

/s/ _____
JOSEPH A. ROTELLA, Esquire
622 Charles Street
Providence, Rhode Island 02904
(401) 861-0012

[Certificate of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Caption Omitted In Printing]

AGREED STATEMENT OF FACTS

1. Plaintiff, DANIEL WEISMAN, is now and has been since 1981, a resident of the City of Providence, State of Rhode Island. Plaintiff, DANIEL WEISMAN owns and has owned since 1982, real property located within the City of Providence. Since 1981, Plaintiff, DANIEL WEISMAN has paid and continues to pay real and personal property taxes to the City of Providence.

2. Plaintiff, DANIEL WEISMAN is now and at all times pertinent hereto has been a citizen of the United States.

3. Plaintiff, DANIEL WEISMAN is the father of Deborah Weisman, age 14, who has attended and continues to attend the public schools owned and operated by the City of Providence. Deborah Weisman graduated from the eighth grade at the Nathan Bishop Middle School in June 1989, and now attends Classical High School. Both of the aforementioned schools are public schools owned and operated by the City of Providence and are within the jurisdiction of the Defendant Members of the Providence School Committee and

the Defendant Superintendent of Schools of the City of Providence.

4. The City of Providence uses and has used, at all times pertinent hereto, taxes raised from real and personal property located in the City of Providence to fund and operate the public schools located within the City, including the Nathan Bishop Middle School and Classical High School.

5. Defendant, ROBERT E. LEE is now and at all times pertinent hereto has been the principal of the Nathan Bishop Middle School, and as such is the administrator of said school.

6. Defendant THOMAS MEZZANOTTE is now and at all times pertinent hereto has been the principal of Classical High School and as such is the administrator of said school.

7. Defendant JOSEPH ALMANGO is now and at all times pertinent hereto has been the superintendent of the Providence Public Schools, including but not limited to the Nathan Bishop Middle School and Classical High School and as such is responsible for the overall administration and supervision of the Providence Public Schools and of the implementation of the policies of the Providence School Committee.

8. Defendants VINCENT McWILLIAMS, ROBERT DeROBBIO, MARY BATASTINI, ALBERT LEPORE, ROOSEVELT BENTON, MARY SMITH, ANTHONY CAPRIO, BRUCE SUNDLUN, and ROBERT GONZALEZ are now and at all times pertinent hereto have been members of the Providence School Committee and as such are responsible for the policies, operation, and supervision of the Providence Public Schools, including but not limited to the Nathan Bishop Middle School and Classical High School.

9. Defendants herein have at all times pertinent hereto been acting under color of state law.

10. The Providence School Department acting as an agency of the City of Providence and the State of Rhode Island, under the authority and control of the Defendant Members of the Providence School Committee, are now and

at all times pertinent hereto have been owners of the public schools located in the City of Providence and of all the equipment located therein.

11. The Defendant Members of the Providence School Committee and Superintendent of Schools sponsor, each year in the month of June, graduation and/or promotional ceremonies for the middle schools and high schools operated as public schools in the City of Providence, including the Nathan Bishop Middle School and Classical High School.

12. The Defendant Members of the Providence School Committee and the Superintendent of Schools are responsible for supervising and authorizing the content of the graduation and/or promotional ceremonies sponsored by the various public schools within the City of Providence.

13. The Defendant Members of the Providence School Committee and the Defendant Superintendent to the Schools are aware of permit, and have authorized the principals of the various public schools within the City of Providence to include invocations and benedictions in the form of prayer, delivered by clergy, in the graduation ceremonies of the various public schools in the City of Providence.

14. Defendant ROBERT E. LEE, principal of the Nathan Bishop Middle School, received, from Assistant Superintendent of Schools Arthur Zarrella, a document entitled "Guidelines for Civic Occasions" as a guideline for the type of prayer to be included in the graduation ceremony of the Nathan Bishop Middle School. A copy of the aforementioned "Guidelines" is attached as Exhibit A and by reference incorporated herein.

15. Assistant Superintendent Arthur Zarrella sent the same "Guidelines for the Civic Occasions," set forth above as Exhibit A, to the principals of all of the City of Providence public schools.

16. The graduation ceremony at the Nathan Bishop Middle School held in June, 1989, was planned by two teachers and employees of the Providence School Department, who suggested to Defendant ROBERT E. LEE that

Rabbi Leslie Y. Gutterman be asked to deliver the invocation and benediction at the June, 1989, promotional ceremony at the Nathan Bishop Middle School. Defendant ROBERT E. LEE accordingly requested Rabbi Gutterman to perform the same.

17. Defendant ROBERT E. LEE provided to Rabbi Gutterman a copy of the "Guidelines for Civic Occasions," set forth above as Exhibit A, and, in addition, spoke personally to Rabbi Gutterman to advise him that prayers that he gave at the invocation and benediction should be non-sectarian in nature.

18. Invocations and benedictions in the form of prayer have been included in some but not all of the graduation and/or promotional ceremonies of the high school and middle schools operated by Defendant Members of the Providence School Committee in prior years and during 1989.

19. From 1985 through 1989, graduation ceremonies of Central High School were held at Veterans Memorial Auditorium, which the Providence School Department rented for the occasion. During each of the aforementioned years, Central High School produced and distributed programs describing the graduation ceremony which include the following information: 1985 Invocation Reverend Raymond Tetreault, St. Michael's Church, Benediction Lucy Santa, St. Michael's Church; 1986 Invocation Reverend William Tanguay, St. Michael's Church, Benediction Lucy Santa, St. Michael's Church; 1987 Invocation Reverend Raymond Malm, St. Michael's Church, Benediction Lucy Santa, St. Michael's Church; 1988 Invocation D. Virgil A. Wood, Pond Street Baptist Church, Benediction Dr. Virgil A. Wood, Pond Street Baptist Church; 1989 Invocation Reverend Moises Mercedes, Star of Jacob Christian Church, Benediction Reverend Moises Mercedes, Star of Jacob Christian Church.

20. For the years 1985 through 1989, Classical High School produced and distributed programs of the graduation ceremonies which indicate the following: 1985 Invocation Reverend Daniel M. Azzarone, Assistant Pastor, St. Anne's Church, Providence, Benediction Rabbi Shalom Strajcher, Providence Hebrew Day School; 1986 Invocation Dr. Virgil

A. Wood, Pastor, Pond Street Baptist Church, Benediction Reverend Daniel M. Trainor, Pastor, Assumption of the Blessed Virgin Mary Church; 1987 Invocation Rabbi Daniel Liben, Temple Emmanuel, Benediction Reverend Patrick Soares, Assistant Pastor, Holy Name Church; 1988 Invocation Rabbi Leslie Gutterman, Temple Beth El, Benediction Reverend Dr. H. Lincoln Oliver, Olney Street Baptist Church; 1989 Invocation Rabbi Wayne M. Franklin, Temple Emanu-El, Benediction Reverend Robert Randall, Pastor, St. Sebastian's Church.

21. For the years 1985 through 1987 and 1989 graduation ceremonies of Hope High School were held at Veterans Memorial Auditorium, which the Providence School Department rented for the occasion. During each of the aforementioned years, Hope High School produced and distributed programs describing the graduation ceremony which include the following information: 1985 Benediction Dr. Daniel Brown; 1986 Invocation Reverend David Russ, Benediction Reverend David Russell; 1987 Invocation Reverend David Russell, God's Holy Tabernacle Church, Benediction Reverend David Russell; 1989 Invocation Reverend David Russell, God's Holy Tabernacle Church, Benediction Reverend David Russell.

22. For the years 1985 through 1988, Mount Pleasant High School held its graduation ceremonies at Rhode Island College. In 1989, graduation ceremonies for Mount Pleasant High School were held at Veterans Memorial Auditorium which the Providence School Department rented for the occasion. During each of the aforementioned years, Mount Pleasant High School produced and distributed programs describing the graduation ceremony which include the following information: 1985 Invocation Reverend Frederick J. Halloran, Pastor, St. Theresa's Church, Benediction Reverend Frederick J. Halloran; 1986 Invocation Reverend Frederick J. Halloran, Pastor, St. Theresa's Church, Benediction Reverend Frederick J. Halloran; 1987 Invocation Reverend Frederick J. Halloran, Pastor, St. Theresa's Church, Benediction Reverend Frederick J. Halloran; 1988 Invocation Reverend Marcel E. Pincince, Blessed Sacrament Church, Benediction Reverend

Marcel E. Pincince; 1989 Invocation Reverend Mario Bordignon, Pastor, St. Bartholomew's Church, Benediction Reverend Mario Bordignon, Pastor, St. Bartholomew's Church.

23. For the years 1985, 1986, 1988 and 1989, Samuel W. Bridgham Middle School promotional ceremonies were held on school property. During each of the aforementioned years, Samuel W. Bridgham Middle School produced and distributed programs describing the promotional ceremony which include the following information: 1985 invocation Father Peter Polo, Pastor, Holy Ghost Church; 1986 Invocation Reverend W.H. Johnson, Adventist Church; 1988 Reverend Clyde Walsh, St. Matthew's Church; 1989 Invocation Reverend W.H. Johnson, Adventist Church.

24. For the years 1983 through 1989, the Nathan Bishop Middle School promotional ceremonies were held on school property. During each of the aforementioned years, Nathan Bishop Middle School produced and distributed programs describing the promotional ceremony which include the following information: 1983 Invocation Father Patrick Soares, Holy Name Church, Benediction Father Patrick Soares, Holy Name Church; 1984 Invocation Reverend Earl Hunt, Benediction Reverend Earl Hunt; 1985 Invocation Reverend Bertrand Theroux, Benediction Reverend Bertrand Theroux; 1986 Invocation Reverend Robert E. Farrow, Benediction Reverend Robert E. Farrow; 1987 Invocation Rabbi Mark Jagolinzer, Benediction Rabbi Mark Jagolinzer; 1988 Invocation Reverend Dr. Lincoln Oliver, Benediction Reverend Dr. Lincoln Oliver; 1989 Invocation Rabbi Leslie Gutterman, Benediction Rabbi Leslie Gutterman.

25. During the years 1984, 1986, 1987 and 1989, Nathaniel Greene Middle School held promotional ceremonies on school property. During each of the aforementioned years, Nathaniel Greene Middle School produced and distributed programs of the promotional ceremonies which indicate that no invocations or benedictions in the form of prayer were included in the ceremonies.

26. During the years 1985 through 1989, Windmill Intermediate School held promotional ceremonies on school property. During each of the aforementioned years, Windmill

Intermediate School produced and distributed programs of the promotional ceremonies which indicate that no invocations or benedictions in the form of prayer were included in the ceremonies.

27. During the years 1983 through 1986 and 1989, Roger Williams Middle School held promotional ceremonies on school property. During each of the aforementioned years, Roger Williams Middle School produced and distributed programs of the promotional ceremonies which indicate that no invocations or benedictions in the form of prayer were included in the ceremonies.

28. During the years 1985 through 1989, the Oliver Hazard Perry Middle School held promotional ceremonies on school property. During each of the aforementioned years, Oliver Hazard Perry Middle School produced and distributed programs of the promotional ceremonies which indicate that no invocations or benedictions in the form of prayer were included in the ceremonies.

29. During the years 1985 through 1989, the Alternate Learning Project held graduation ceremonies on school property. During each of the aforementioned years, the Alternate Learning Project produced and distributed programs of the promotional ceremonies which indicate that no invocations or benedictions in the form of prayer were included in the ceremonies.

30. All of the aforementioned schools are public schools located within the City of Providence and within the jurisdiction of Defendant Members of the Providence School Committee and Defendant Superintendent of Schools.

31. Each of the aforementioned invocations and benedictions delivered during the graduation and/or promotional ceremonies were prayers.

32. During the time that the Defendant ROBERT E. LEE served as Assistant Principal at Hope High School, a public school operated by the Providence School Department in the City of Providence, from 1983 to 1988 prayers were included at all the graduation ceremonies at Hope High School.

33. During the time that the Defendant ROBERT E. LEE served as Assistant Principal at Central High School, a public school operated by the Providence School Department in the City of Providence, from 1976 to 1983 prayers were included at all the graduation ceremonies at Central High School.

34. Graduation and/or promotional ceremonies sponsored by the Providence School Department within the middle schools and high schools under the jurisdiction of the Defendant Members of the Providence School Committee and Defendant Superintendent of Schools are conducted either on school premises or in facilities which the school department rents, using tax funds. The school facilities themselves are owned by the City of Providence.

35. The graduation ceremony for the eighth grade class of the Nathan Bishop Middle School, which class included Deborah Weisman, was held on the morning of June 20, 1989, on the premises of the Nathan Bishop Middle School.

36. The graduation ceremony of the Nathan Bishop Middle School on June 20, 1989, included an invocation and benediction in the form of prayer, delivered by Rabbi Leslie Y. Gutterman. The contents of the aforementioned invocation and benediction are attached hereto as Exhibit B and by reference made a party hereof.

37. The graduation ceremony of Classical High School held in June, 1989, on the premises of Classical High School, also included an invocation and benediction in the form of prayer.

38. It is the practice of the Defendant THOMAS MEZ-ZANOTTE to include an invocation and benediction in the form of prayer in the graduation ceremonies that take place each year at Classical High School.

39. The graduation the promotional ceremonies held at the middle schools and high schools operated by the Providence School Department are supervised by employees and agents of Defendant Members of the Providence School Committee.

40. The invocations and benedictions delivered at the graduation and promotional ceremonies in the Providence public schools are delivered by members of the clergy chosen by agency of the Defendant Members of the Providence School Committee. These individuals are identified by name at the graduation and/or promotional ceremony at which they are speaking.

41. Attendance at graduation and promotional ceremonies is voluntary.

42. Parents and friends of students participating in promotional and/or graduation ceremonies at the Providence public schools are invited to attend the school's ceremonies.

43. Plaintiff, DANIEL WEISMAN, is opposed to and offended by the inclusion of prayer in the public school graduation and/or promotional ceremonies of his child both at the middle school and the high school level.

44. Municipal tax funds are used to operate and maintain the Providence public schools and to fund their graduation and/or promotional ceremonies.

45. Plaintiff, DANIEL WEISMAN, is opposed to the expenditure of his tax funds for school ceremonies which include prayer.

46. Some of the Providence public schools do not regularly include invocations and benedictions in the form of prayer in their graduation and/or promotional ceremonies.

47. Plaintiff, DANIEL WEISMAN, belongs to the Jewish faith.

48. Defendants have no plans to change their policy as to the inclusion of the invocations and benedictions in the form of prayer at the graduation and/or promotional ceremonies of the Providence High Schools and Middle Schools. Accordingly, it is probable that future graduation ceremonies at various Providence public schools will include invocations and benedictions in the form of prayer.

49. Defendants intend to continue to allow the inclusion of invocations and benedictions in the form of prayer at the

graduation and/or promotional ceremonies of the Providence public high schools and middle schools.

Plaintiff
By his Attorneys

Defendants
By their Attorneys

/s/ _____
Sandra A. Blanding,
Esquire
Revens & DeLuca Ltd.
946 Centerville Road
Warwick, RI 02886
(401) 822-2900

/s/ _____
Joseph Rotella,
Esquire
622 Charles Street
Providence, RI
02903

PUBLIC PRAYER IN A PLURALISTIC SOCIETY

Guidelines for Civil Occasions

Spoken prayer is common on many civic occasions such as club meetings, legislative sessions, graduations, political rallies, testimonial dinners and community forums. Prayer in settings which are primarily secular should bind a group together in a common concern. However, it can become divisive, even if not intended, when forms or language exclude some persons.

Individuals who lead the general community in prayer have a responsibility to be clear about the purpose as well as the nature of the occasion. Prayer on behalf of the general community should be general prayer. General prayer is inclusive, non-sectarian and carefully planned to avoid embarrassments and misunderstandings. Those who are reluctant to offer general prayer should be given the option of declining an invitation.

General public prayer on civil occasions is authentic prayer that also enables people to recognize the pluralism of American society.

Prayer of any kind may be inappropriate on some civic occasions. Decision should show respect both for public diversity and for the serious nature of prayer.

GENERAL PUBLIC PRAYER -

- . . . seeks the highest common denominator without compromise of conscience.
- . . . calls upon God on behalf of the particular public gathered; avoids individual petitions.
- . . . uses forms and vocabulary that allow persons of different faiths to give assent to what is said.

APPENDIX A

AGREED STATEMENT OF FACTS

- . . . uses universal, inclusive terms for deity rather than particular proper names for divine manifestations. Some opening ascriptions are "Mighty God," "Our Maker," "Source of all Being," or "Creator and Sustainer." Possible closing words are "Hear Our Prayer," "In Thy Name, Goodness Flourish," or, simply, "Amen."
- . . . uses the language most widely understood in the audience, unless one purpose of the event is to express ethnic/cultural diversity, in which case multiple languages can be effective.
- . . . considers other creative alternatives, including a moment of silence.
- . . . remains faithful to the purposes of acknowledging divine presence and seeking blessing, not as opportunity to preach, argue or testify.

These guidelines for inclusiveness and sensitivity on prayer should also apply to the content of meditations or addresses on civic occasions, and to the selection and performance of music.

WHAT IS THE NCCJ?

The National Conference of Christians and Jews is an organization of people from different religious, racial and ethnic backgrounds learning to live together without bigotry or discrimination and without compromising distinctive faiths or identities. Founded in 1928, NCCJ promotes education for citizenship in a pluralistic society, and attempts to help diverse people discover their mutual self-interests on the common ground of democracy. NCCJ has 73 offices nationwide.

Public prayer in a pluralistic society must be sensitive to a diversity of faiths. Leading public prayer is both a privilege and a responsibility.

National Conference of Christians & Jews
345 Blackstone Blvd., Hall Bldg.
Providence, R.I. 02906

NATHAN BISHOP GRADUATION

INVOCATION

God of the Free, Hope of the Brave:

For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all can seek justice we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN

APPENDIX B

AGREED STATEMENT OF FACTS

NATHAN BISHOP GRADUATION

BENEDICTION

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teacher and administrators who helped prepare them.

The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

AMEN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Caption Omitted In Printing]

SUPPLEMENTAL AGREED STATEMENT OF FACTS

The Defendants have not specifically directed any of their agents to request clergy to deliver prayers at the promotional and/or graduation ceremonies sponsored by the Providence public schools.

Plaintiff
By his Attorneys

/s/ _____
Sandra A. Blanding,
Esquire
Revens & DeLuca Ltd.
946 Centerville Road
Warwick, RI 02886
(401) 822-2900

Defendants
By their Attorneys

/s/ _____
Joseph Rotella, Esquire
622 Charles Street
Providence, RI 02903

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Caption Omitted In Printing]

TRANSCRIPT OF PROCEEDINGS IN ABOVE-CAPTIONED CASE BEFORE CHIEF JUDGE FRANCIS J. BOYLE.

APPEARANCES:

For Plaintiffs: SANDRA A. BLANDING, Esquire
946 Centerville Road
Warwick, Rhode Island

For Defendants: JOSEPH A. ROTELLA, Esquire
797 Westminister Street
Providence, Rhode Island

Court Reporter: Louis V. Spertini
307 Federal Building
Providence, Rhode Island 02903

TUESDAY, OCTOBER 10, 1989

MISS BLANDING: Your Honor, I have a memorandum I'd like to submit to the Court.

THE COURT: And do you want me to hear you or do you want me to read the memorandum, or what am I supposed to do at this point? You don't want me to do both certainly at the same time.

MISS BLANDING: No, your Honor. Your Honor put this on this morning, I think when we came before the Court last week, I had submitted a proposed agreed statement of facts to Mr. Rotella. Mr. Rotella told me this morning that there was one addition that he wanted made which we discussed, and he advises me now that he simply has to clear that with the Superintendent of Schools.

THE COURT: Go right in there to the telephone and call him.

MR. ROTELLA: Okay, your Honor. Your Honor, I also wanted to point out that we filed a memorandum.

THE COURT: I got that this morning, too.

MR. ROTELLA: Thank You.

THE COURT: I haven't had time to read that either. Maybe while you're making the phone call, I can read your memo.

MR. ROTELLA: Thank you, your Honor.

(PAUSE)

THE COURT: I'm sorry, I did read your memo, by the way.

MR. ROTELLA: My memo was very short.

THE COURT: Very brief.

MR. ROTELLA: It was very brief.

THE COURT: This one obviously I'm not going to be able to read without a very long pause.

MISS BLANDING: Those are the cases, your Honor, I'm not as verbose as the Supreme Court.

(DOCUMENT HANDED TO COURT)

THE COURT: Okay, you can go call.

(MR. ROTELLA EXITS COURTROOM - RETURNS)

MR. ROTELLA: Your Honor.

THE COURT: What did you find out?

MR. ROTELLA: We have an agreement on the agreed statement of facts. We will add this paragraph to clarify.

THE COURT: What is the paragraph you're adding?

MR. ROTELLA: The paragraph reads: "The Defendants have not specifically directed any of their agents to request

clergy to deliver prayers at the promotion and/or graduation ceremony sponsored by the Providence School Department."

THE COURT: Is that agreed to?

MISS BLANDING: Yes, your Honor.

THE COURT: All right. You have given him though the circular that tells them what kind of prayer they can say.

MR. ROTELLA: Yes, we have.

THE COURT: Okay.

MR. ROTELLA: But we haven't told them to deliver a prayer in that sense.

MISS BLANDING: Your Honor, the agreed statement of facts is typed up except for the exclusion of that paragraph.

THE COURT: All right, file that and you can just supplement it with that paragraph.

MISS BLANDING: Okay, your Honor.

THE COURT: All right, I'll hear you.

MISS BLANDING: Your Honor, other than the agreed statement of facts and the memorandum, we have no need to present additional testimony.

THE COURT: I'll hear you then.

MISS BLANDING: Your Honor, as your Honor is aware, this case was brought by a parent of a school child who is attending the Providence Public School System. Last year, Daniel Weisman's daughter was an eighth grade student at the Nathan Bishop Junior High School, and this year she is attending Classical High School. According to the agreed statement of facts, the School Department in Providence has allowed in the past invocation and benediction delivered by clergy to be offered at the promotional ceremonies of middle schools and the graduation ceremonies of the high schools.

Those invocations and benedictions, it is agreed to, to have been in the form of prayer. And last year, the Assistant Superintendent of Schools, Arthur Zarella, circulated to the Principals of each of the middle schools and high schools a circular which describes what's called in the circular non-sectarian prayer, and purports to advise what kind of prayer is appropriate for public ceremonies.

We have submitted as part of the agreed statement of facts the invocation and benediction which was delivered by Rabbi Gutterman at the Nathan Bishop Middle School last year. We have also submitted a list of the names and church affiliations of clergy as they were printed in programs and distributed by the various high schools and middle schools within the last several years. It's clear from the programs that were printed, and also as a part of the agreed statements of facts, that not all of the middle schools or all of the high schools have traditionally included invocations and benedictions in the form of prayer as part of their ceremony. It's our position that this practice has to be evaluated under the three-pronged *Lemon* test, and that in reviewing the prior court decisions, both in the Supreme Court and in the lower court, in light of that test, that the practice of the Providence School Department fails each prong of the *Lemon* test. There have been several cases that are cited in my memorandum that had said that prayer is inherently a religious activity and that the purpose of prayer can only be religious in nature.

THE COURT: What is prayer?

MISS BLANDING: Well, your Honor, a prayer, I believe in the amicus brief, there was a definition of prayer.

THE COURT: How about your definition of prayer?

MISS BLANDING: My definition of prayer would be anything that calls upon God in any way, either God's blessing or God's assistance or anything like that. A prayer is a request to a god or a higher being.

THE COURT: Suppose that Rabbi Gutterman said this: For the legacy of American where diversity is celebrated and the rights of minorities we are grateful to our fellow citizens, we thank you. May these young men and women grow up to enrich it for the liberty of America which we all join, we thank you. May those new graduates grow up to guard it. For the political process of America which all its citizens may participate, for its court system where all can seek justice we are grateful to our fellow citizens. May those we honor this morning always run to it in trust. Suppose he said that, would you have any objection to that?

MISS BLANDING: No, your Honor.

THE COURT: In other words, the only thing that you object to is an appeal to a deity.

MISS BLANDING: That's correct, your Honor.

THE COURT: Suppose he said: My fellow citizens, to each according to his needs, from each according to his abilities. Would you let him say that?

MISS BLANDING: Yes, your Honor.

THE COURT: Because it's communist doctrine and communism denies a deity, right?

MISS BLANDING: No, your Honor.

THE COURT: So you can preach communism at an invocation, but he can't refer to "in God we trust."

MISS BLANDING: I don't think there has ever been a Supreme Court case where the Court has allowed a preaching or a prayer or an invocation in a school setting to a deity. I think that all of the cases, all of the cases that the United States Supreme Court have decided suggest that when you're dealing with a public school setting, that it's necessary to be extremely careful and perhaps impose a more severe test than one would in any other circumstances because of the unique nature that the public schools fulfill.

THE COURT: Do you agree with the amicus brief that says inspirational secular speech is all right?

MISS BLANDING: Yes.

THE COURT: Okay, go out and win one for the Gipper, that's perfectly all right?

MISS BLANDING: Yes.

THE COURT: Okay.

MISS BLANDING: What we are objecting to is the School Department's allowance of a prayer to a higher being.

THE COURT: Do you see any prior restraint problem here?

MISS BLANDING: No, because what we are asking for, your Honor, is that right now I think it's clear from the circular that's been submitted to all of the Principals and that Mr. Lee has said that he gave to Rabbi Gutterman, that what the school expects is a prayer.

THE COURT: Okay.

MISS BLANDING: And that the school is sanctioning a prayer. What we would like is -

THE COURT: But you want them to send out a circular that says: Thou shall not pray.

MISS BLANDING: If the School Department is going to request individuals to give invocations and benedictions, I think it's necessary for them to make clear that they want it to be what the amicus brief said, a secular inspirational message and that prayer is not allowable in a public school setting. If the School Department did that, if they were enjoined from suggesting or in any way allowing or authorizing the inclusion of prayer in graduation ceremonies, then we would be satisfied with that.

THE COURT: What do we do if they have Joe Dokes who's a born-again Christian, who was asked to give the invocation or the benediction and he does mention God?

MISS BLANDING: I think, your Honor, if the School Department has made it clear to the individual that they are asking to give an opening inspirational message, that it cannot be a prayer, that that's all they can do, if they ask, if they ask an outside individual to deliver an opening statement -

THE COURT: Well, how about the situation now? Except for that circular, if they simply said to Rabbi Gutterman, can you show up next Wednesday night at 7:30 to open our graduation ceremony, and Rabbi Gutterman went there and gave the invocation that's indicated, can he do that?

MISS BLANDING: I think that, first of all, I think that the words invocation and benediction are ambiguous. I mean, to me if someone said "Will you give an invocation?" I would assume they meant a prayer because to me.

THE COURT: But you agree that an inspirational secular speech may be made?

MISS BLANDING: Yes, your Honor, but what I'm saying is -

THE COURT: Why can't you make an inspirational secular invocation?

MISS BLANDING: You can. What I am suggesting, your Honor, is that the word "invocation" I think means different things to different people. What my position is is that the School Department now, at the very least, has not made it clear, in fact they've gone the other way, they've made it clear that it is allowable to give prayers.

THE COURT: Suppose you have a School Committee composed entirely of lawyers.

MISS BLANDING: Mm-hmm.

THE COURT: Who said "Rabbi Gutterman, we want you to come to this graduation ceremony and make an opening and a closing statement." Do you have any problem with that?

MISS BLANDING: I think that -

THE COURT: And he gets up and he give this statement.

MISS BLANDING: I think that because of the past practice and because of general knowledge that prayers have been used in the past, that the School Department needs to do more than just say "We want you to make an opening and a closing." I think that they need to say it can't be a prayer. It can be an inspirational message, that that's what we would like, but it needs to be not a prayer.

THE COURT: And that's not a prior restraint?

MISS BLANDING: No, I don't think so, your Honor, any more than if you invited someone to deliver, to deliver an opening ceremony in a classroom, that you're going to tell them that they can't pray. I mean, if, certainly I doubt that the Supreme Court would uphold a situation where, for instance, that state said every morning we are going to take an outside agent into the school and ask him to deliver an opening message, and that opening message happened to be a prayer every single time.

THE COURT: That would be pretty obvious after a while, wouldn't it?

MISS BLANDING: Well, I think it's pretty obvious here, too. I think it's very obvious, that's been the practice. Each time it's clergy that are asked to deliver this. We have agreed that they are authorized and allowed and that it's been a past practice for them to deliver invocations and benedictions in the form of prayer. We've agreed to that.

THE COURT: And the Defendant says indeed that's the case, so it's all right, it's always been done.

MISS BLANDING: That's right, but it isn't always done because it's also clear from the agreed statement of fact that there are some schools, both at the middle school and the high school level, that do not include prayers in their graduation ceremonies. So, yes, it's been a past practice to allow it. Yes, it's been a past practice to authorize it. But is it universally done in the schools? No.

THE COURT: What do you think about the distinction that's made in the amicus brief that says *Marsh* doesn't apply here because public schools didn't exist at the time the Constitution was adopted, that public schools, that is, free public schools are a fairly recent historical development in terms of 200 years of constitutional history?

MISS BLANDING: I agree that *Marsh* doesn't apply here, but I'm not sure I would use the same reasoning.

THE COURT: You might have a problem with that reasoning, might you, because the fact of the matter is the history of the whole situation here is that the first public schools in this country, beginning with the founding of this country, and well beyond the establishment of the Constitution, were all religious in nature. That was the reason for them. They were religious schools, isn't that so?

MISS BLANDING: I don't know, your Honor.

THE COURT: I think if you look at the history, you'll find that to be the case. So if you make the argument, you could be in trouble.

MISS BLANDING: Even if that is the case, your Honor, I still don't think *Marsh* applies here for two reasons. One is that the case of *Edwards vs. Aquilar* was decided after *Marsh* and applied the *Lemon* test to a school situation. The United States Supreme Court has never applied the *Marsh* test to a school situation. The second is that in the *Marsh* case, the Court relied on the fact that the Legislature had always in the entire history of the country opened with a prayer. In this particular case, it's not even true that now every school opens

graduation ceremony with an invocation and benediction because even within the school system itself, that has never been the case and is not the case now. So there is not that kind of history that —

THE COURT: How about those who have been doing it, can continue to do it, and those who haven't done it, stop them from doing it?

MISS BLANDING: I don't think so, your Honor, but that's not the case. In any case, that's not the situation that is presently before the Court. I would take the position that *Marsh* does not apply to a public school setting. And even though this is not an actual classroom setting, it is certainly public school setting, and if you compare this to cases like *Jaeger*, for instance, when they are talking about invocations before football games, surely a graduation ceremony is much more important and significant in the life of a child than is a football game or a pep rally.

THE COURT: You're not a football fan, that's the problem with that argument.

MISS BLANDING: That's true, your Honor, or a school assembly.

THE COURT: You don't know how important it is to win that Thanksgiving Day game, all right?

(LAUGHTER)

MISS BLANDING: So I would submit, your Honor, some of the —

THE COURT: Some of them who will show up for the football game won't show up for the graduation, all right?

MISS BLANDING: I'm sure that's true, your Honor, I'm sure that's true. But it puts a real burden on students. I mean, the school has made a point of saying that graduation ceremonies are voluntary, and that's true, we have agreed to the fact. But it certainly puts a burden, an unfair burden, and I

think an unconstitutional burden, on a school child who does not wish to participate in a school-promoted activity that includes prayer to say you don't have to come to your own graduation if you don't want to. I have nothing further, your Honor.

THE COURT: Okay. Mr. Rotella.

MR. ROTELLA: Obviously, your Honor, if your Honor has read the brief that we've submitted in this particular matter, we take the position that *Marsh* is in fact, should be the test in this situation. I also point out in that brief the case of *Stein*.

THE COURT: Is that the Sixth Circuit?

MR. ROTELLA: That's the Sixth Circuit case, *Stein vs. Plainville Schools*.

THE COURT: There are other Circuits that go a different way.

MR. ROTELLA: Yes, there are other Circuits that go a different way, but most of those Circuits are dealing with activities that are not graduation ceremonies. They're dealing with football games.

THE COURT: What difference does it make if the graduation takes place in the Veterans Auditorium and not on the school grounds?

MR. ROTELLA: I'm not talking about the location, your Honor, I'm talking about the spirit of the thing itself, of the activity itself. In a football setting, you have a coach, these children are looking up to a coach. He is giving them an inspirational-type rah-rah.

THE COURT: That wasn't what was happening in that case though, was it? It was the coach who was giving the invocation.

MR. ROTELLA: But there were other individuals, they were selecting other individuals of the clergy who were out there.

THE COURT: They were clergymen for the most part.

MR. ROTELLA: Right, right. What I'm saying is the situation in its totality was a different situation than a graduation-type ceremony. When you look at *Marsh*, okay, when you look at, as I've pointed out in that brief that I've submitted, your Honor, there was a very interesting dissent done by Judge Rooney with regard to the – if I can just find it – in the *Jaeger* case, the football case, okay, where he basically looks at this and comes to a conclusion that says in effect there's a common thread. It says, "A common sense balancing of the danger of government establishment of religion with the recognition of religious traditions as part of our nation's fabric." The Court pointed out just a few minutes ago that the first public schools in the country were religious schools.

THE COURT: It's never meant anything in constitutional dimensions.

MR. ROTELLA: No, it has not.

THE COURT: For some reason or other. Why was Harvard University started, all right, you begin there. Brown University. But it's never meant anything in the constitutional dimension, even to those who look to the history of the Constitution look back to 200 years and say what did these people have in mind when they said establishment of religion.

MR. ROTELLA: Mm-hmm.

THE COURT: None of the cases tested against that historic background, that all of the schools were religious schools. That's what started them. They were started so that people could learn to read so they could read the Bible. That's what it was all about in the beginning. Free public schools are a Nineteenth Century development. But you don't see that in any of these cases. What you see in these cases is a pretty

consistent, remarkably consistent point of view from the Supreme Court that there shall not be prayer in the public schools. How do you get *Marsh* in the door on that one?

MR. ROTELLA: I think you get *Marsh* in the door by looking at the circumstances.

THE COURT: You can say anything else you want to say in the public schools, but you can't pray. That's the one thing you cannot do.

MR. ROTELLA: You can give a secular-type prayer, but not a prayer in the –

THE COURT: You can't call upon a deity. You can't make an appeal to a deity. Isn't that what all these cases say? Isn't graduation a part of the school process, so why is this constitutional?

MR. ROTELLA: I think the *Stein* Court breaks away from the mold. I think the decision in *Stein* looks at *Marsh* and says it has the same applicability to the schools.

THE COURT: But you have the situation where the school prayer cases, where a particular prayer is prescribed, that's not appropriate, a moment of silence is not appropriate. There's no praying to be done on the public school premises, period.

MR. ROTELLA: Then the same should hold true for Legislatures. The same should hold true for the opening court sessions. The same should hold true for all the other areas. I mean, the Supreme Court has drawn a line of demarcation. The line of demarcation says public schools are exempt and everyone else you can do it just a little bit. We walked in this morning and your Clerk gave an invocation that included the name of God, okay. If you've got a dollar bill in your pocket or a quarter or a dime in your pocket, it has the name of God on it. Why is it so –

THE COURT: The pledge of allegiance has God in it.

MR. ROTELLA: The pledge of allegiance has God.

THE COURT: Can you use that in school?

MR. ROTELLA: I think they did up until -

THE COURT: They did?

MR. ROTELLA: Yes, I think.

THE COURT: Do they still?

MR. ROTELLA: Yes, they do.

THE COURT: So God gets in there somehow.

MR. ROTELLA: The point that I'm trying, I think the point of the cases here, your Honor, are where do you draw the line of demarcation? Where do you say God is not allowable or the use of the word "God" or anything that relates to that is not allowable in the public schools? I think *Marsh* takes a look at it, *Lemon* takes a look at it and they set up a three-pronged test.

THE COURT: Doesn't the mention of God, or whatever, advance religion?

MR. ROTELLA: I don't see how. Why should it advance religion? Just because you mention the name "God," where does that advance religion, okay? If that be the case, then let's take it off the coin, let's take it out of the Legislature, let's take it out of the openings of court sessions and be done with it so that the next generation of children, okay, when they reach that point in time when a Court is opening, they can say, "We're all here, let's open it up and be done with it." Because that's where we're going as far as ceremonial prayer is concerned. We're going to that point where no mention of God means that pillars of the society that we have developed here over the past couple of years -

THE COURT: Whenever a Judge is sworn in here, we have an invocation and a benediction which is a prayer as defined.

MR. ROTELLA: When we have a swearing-in of a President, I believe they have it done on the Bible in most instances. The one I can remember most was President Johnson being sworn in in the airplane in Dallas in 1963. The point I'm trying to make, your Honor, is that I think, okay, there is a place for a ceremonial-type invocation and benediction. I think *Marsh*, in the *Marsh* decision, the Court has looked at the ability of someone to give an invocation at a legislative session, okay, and it's carried forward in *Stein* to apply to those particular-type ceremonial sessions that would be a high school graduation. Thank you, your Honor.

THE COURT: Anything else?

MISS BLANDING: No, your Honor.

THE COURT: I'm going to take the matter under advisement and we'll file a written opinion as soon as we can. Court will be in recess.

(PROCEEDINGS CONCLUDED)

I hereby certify that the foregoing, to wit, pages 2 through 22, is a true and correct transcript of proceedings had in above-captioned case.

/s/ _____
Louis v. Spertini
Official Court Reporter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Caption Omitted In Printing]

JUDGMENT

1. The inclusion of prayer in the form of invocations or benedictions at public school promotion or graduation exercises in the City of Providence is unconstitutional in violation of the First Amendment of the United States Constitution.

2. The School Committee of the City of Providence, its agents or employees, are permanently restrained and enjoined from authorizing or encouraging the use of prayer in connection with school graduation or promotion exercises.

SO ORDERED.

ENTERED:

/s/

FRANCIS J. BOYLE, CHIEF JUDGE
United States District Court
District of Rhode Island

Dated: January 12, 1990

[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CLERK'S CERTIFICATE

I, Frederick R. DeCesaris, Clerk of the United States District Court for the District of Rhode Island, do hereby certify that the foregoing contains all the original papers in the file dealing with the action or proceedings in which the appeal is taken and includes all the original papers as set forth in the Table of Contents herein.

Witness my hand and the Seal of said Court at Providence in said District, the 7th day of February A.D. 1990.

Frederick R. DeCesaris, Clerk

By: /s/ _____
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DANIEL WEISMAN, etc.
Plaintiff-Appellee

vs.

C.A. No. 89-0377B

ROBERT E. LEE, et al
Defendant-Appellant

NOTICE OF APPEAL

Notice is hereby given that Robert E. Lee, et al., the defendants above-named, hereby appeal to the United States Court of Appeals for the First Circuit from the judgment entered in this action on January 12, 1990.

Robert E. Lee, et al.
By their Attorney

/s/

Joseph A. Rotella, Esquire
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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1151.

[Caption Omitted In Printing]

JUDGMENT

Entered: July 23, 1990

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

Cost in favor of appellee
are taxed at (\$63.00)

By the Court:

/s/

Clerk

By: /s/

Chief Deputy Clerk

No. 90-1014

Supreme Court, U.S.
FILED
MAY 24 1991
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1990

ROBERT E. LEE, ET AL.,

Petitioners,

v.

DANIEL WEISMAN, ETC.,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The First Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Do school authorities violate the Establishment Clause by allowing a speaker at a public junior high or high school graduation ceremony to offer an invocation and a benediction that acknowledge a deity?

2. Whether direct or indirect government coercion of religious conformity is a necessary element of an Establishment Clause violation?

THE PARTIES

1. The petitioners in this case, who were the appellants in the court of appeals, are Robert E. Lee, individually and as principal of Nathan Bishop Middle School of Providence, Rhode Island; Thomas Mezzanotte, individually and as principal of Classical High School of Providence, Rhode Island; Robert F. Roberti, individually and as superintendent of the Providence School Department; and Vincent P. McWilliams, Mary Bastastini, Roosevelt Benton, Roberto Gonzalez, Donald Lopes, Jintana Pond, Lisa Powers, Mary Smith, and Julia Steiny individually and as members of the Providence School Committee.

2. The respondent in this case, who was the appellee in the court of appeals, is Daniel Weisman, personally and as next friend of Deborah Weisman.

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No. 90-1014

—◆—
In The
Supreme Court of the United States
October Term, 1990
—◆—

ROBERT E. LEE, ET AL.,

Petitioners,

v.

DANIEL WEISMAN, ETC.,

Respondent.

—◆—
On Writ Of Certiorari To The United States
Court Of Appeals For The First Circuit
—◆—

BRIEF FOR THE PETITIONERS
—◆—

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 908 F.2d 1090, and is reproduced in the Appendix to the Petition for a Writ of Certiorari at App.1a.

The opinion of the United States District Court for the District of Rhode Island is reported at 728 F.Supp. 68, and is reproduced in the Appendix to the Petition for a Writ of Certiorari at App. 18a.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on July 23, 1990. No petitions for rehearing were filed. The Petition for a Writ of Certiorari was timely filed on December 21, 1990, and was granted on March 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Establishment Clause of the First Amendment to the United States Constitution, which provides: "Congress shall make no law respecting an establishment of religion."

STATEMENT OF THE CASE

A. The Graduation Ceremony

For many years the Providence School Committee and Superintendent have permitted, but not directed, school principals to include invocations and benedictions in the graduation ceremonies of the city's public junior high and high schools. J.A. 12, 24; App. 19a.¹ As a result, some, but not all, public middle and high schools in Providence have included invocations and benedictions in their graduation ceremonies. J.A. 4, 12-16, 18; App. 19a. Such invocations and benedictions are not written or delivered by city employees, but by members of the clergy invited to participate in these ceremonies for that purpose. J.A. 12-13, 18. The schools provide the clergy with guidelines for the ceremonies prepared by the National Conference of Christians and Jews, which stress inclusiveness and sensitivity in authorizing nonsectarian prayer for public civic ceremonies. J.A. 13, 20-21; App. 19a. The clergy who have delivered these prayers in recent years have included Jewish rabbis and ministers of various Christian denominations. J.A. 12-15.

As the parties have stipulated, attendance at these ceremonies is voluntary, J.A. 18, with parents and friends of the students invited to attend. J.A. 18. The high school graduation ceremonies are usually held off school grounds, while middle school promotion ceremonies usually take place on the premises of the school. J.A. 12-16, 18; App. 19a.

¹ "J.A." denotes the Joint Appendix. "App." denotes the Appendix to the Petition for a Writ of Certiorari.

Respondent Daniel Weisman's daughter, Deborah, was graduated from Nathan Bishop Middle School, a public junior high school in Providence, in June 1989. J.A. 4-5, 10; App. 19a. Rabbi Leslie Gutterman of the Temple Beth El of Providence delivered the invocation and benediction at the ceremony. J.A. 17; App. 19a.

Four days before the ceremony, respondent sought a temporary restraining order to prevent the inclusion of invocations and benedictions in the graduation ceremonies of the Providence public junior high and high schools.² App. 19a. The district court denied the motion the day before the ceremony, due to lack of time to consider it adequately before the scheduled event. App. 19a-20a.

On June 20, 1989, Deborah Weisman and her family attended the scheduled graduation ceremony at Nathan Bishop Middle School. App. 20a. Rabbi Gutterman's invocation addressed a deity at the beginning, and concluded with "Amen."³ App. 20a. The benediction opened with a reference to God, asked God's blessing, gave thanks to the Lord, and

² Respondent invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1343, 2201, and 2202 (1988), as well as the court's pendant and ancillary jurisdiction, J.A. 2.

³ The invocation, in its entirety, read as follows:

God of the Free, Hope of the Brave:

For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all can seek justice we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN

App. 20a.

concluded with "Amen."⁴ The district court characterized both the invocation and the benediction as "examples of elegant simplicity, thoughtful content, and sincere citizenship." App. 20a.

Deborah Weisman entered Classical High School in Providence in September 1989, and she has continued to attend that school since then. J.A. 10; App. 21a. In July 1989, respondent filed an amended complaint in this action, seeking a permanent injunction against invocations and benedictions in future graduation ceremonies of the Providence public junior high and high schools. App. 21a. The district court ruled in favor of respondent and granted the requested relief.

B. The District Court Decision

The district court's Establishment Clause analysis, which the court of appeals majority characterized as "sound and pellucid" and adopted as its own, App. 2a, opened with the observation that under this Court's precedents "God has been ruled out of public education as an instrument of inspiration or consolation" because of "the perceived sensitive nature of the school environment and the apprehended effect of state-led religious activity on young, impressionable minds." App.

⁴ The benediction, in its entirety, read as follows:

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

Happy families give thanks for seeing their children achieve an important milestone.

Send Your blessings upon the teachers and administrators who helped prepare them.

The graduates now need strength and guidance for the future. Help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

AMEN

App. 20a-21a.

21a-22a. The district court determined that the invocation and benediction failed under the second prong of the three-prong test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The practice impermissibly advanced religion "by creating an identification of school with a deity." App. 24a. According to the district court, "the Providence School Committee ha[d] in effect endorsed religion in general by authorizing an appeal to a deity in public school graduation ceremonies." App. 25a. The district court did not reach the other inquiries under *Lemon* – whether the practice had a secular purpose and whether it fostered an excessive entanglement with religion.

The district court expressly declined to follow the Sixth Circuit's reasoning in *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), which held that nondenominational invocations and benedictions in public school graduation ceremonies are not *per se* unconstitutional. The *Stein* court had relied upon *Marsh v. Chambers*, 463 U.S. 783 (1983), in which this Court rejected an Establishment Clause challenge to the Nebraska Legislature's practice of opening each day's session with a prayer offered by a paid chaplain. The district court here, however, concluded that the "*Marsh* holding was narrowly limited to the unique situation of legislative prayer." App. 27a. As proof of this point, the district court noted that *Marsh* was the only case since 1971 in which the Court did not apply the *Lemon* test. The district court also noted that application of the *Marsh* analysis in the context of graduation invocations and benedictions would result in courts "reviewing the content of prayers to judicially approve what are acceptable invocations to a deity." App. 27a.

Finally, the district court made clear that Rabbi Gutterman's invocation and benediction were unconstitutional solely because they made reference to a deity:

[N]othing in this decision prevents a cleric of any denomination or anyone else from giving a secular inspirational message at the opening and closing of the graduation ceremonies. Counsel for plaintiff conceded at argument, as she must, that if Rabbi Gutterman had given the exact same invocation as he delivered at the Bishop Middle School on

June 29, 1989 with one change – God would be left out – the Establishment Clause would not be implicated.

App. 28a. To punctuate the point, the court recast a new version of Rabbi Gutterman's invocation, one cleansed of its references to God and, thus, of its perceived constitutional infirmity. App. 28a.

C. The Court of Appeals Decision

A majority of the Court of Appeals for the First Circuit affirmed, over a dissenting opinion by Judge Campbell. The panel majority simply endorsed the district court's opinion and did not elaborate further. App. 2a.

Judge Bownes concurred separately, concluding that the invocation and benediction violated all three prongs of the *Lemon* test. Noting that "[a] graduation ceremony does not need a prayer to solemnize it," Judge Bownes concluded that the primary purpose of the practice is religious. App. 9a-10a. He also believed that "it is self-evident that a prayer given by a religious person chosen by public school teachers communicates a message of government endorsement of religion." App. 10a. The practice fostered an excessive entanglement with religion by virtue of the School Committee's policies of providing guidelines for the composition of nondenominational invocations and of permitting school authorities to select the speakers. App. 10a-11a.

Judge Bownes also found this Court's decision in *Marsh* inapposite. *Marsh*, according to Judge Bownes, "was based on the 'unique' and specific historical argument that the framers did not find legislative prayers offensive to the Constitution because the first Congress approved of legislative prayers." App. 11a. *Marsh* did not apply here "since free public schools were virtually nonexistent at the time the Constitution was adopted." App. 11a (quoting *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987)). Thus, Judge Bownes rejected the Sixth Circuit's analysis in *Stein*, and also criticized that court's "troubling" inquiry into the nondenominational content of the challenged invocation. App. 12a. Finally,

Judge Bownes stated that the Establishment Clause would have been offended by Rabbi Gutterman's invocation and benediction even if cleansed of their references to a deity. Noting that invocations and benedictions "are by their very terms prayers and religious," Judge Bownes concluded that the practice "offends the First Amendment even if the words of the invocation or benediction are somehow manipulated so that a deity is not mentioned." App. 13a.

In dissent, Judge Campbell believed that "*Marsh* and *Stein* provide a reasonable basis for a rule allowing invocations and benedictions on public, ceremonial occasions," so long as school authorities take care to invite speakers representing a wide range of religious beliefs and nonreligious ethical philosophies. App. 16a.

INTRODUCTION AND SUMMARY OF ARGUMENT

When this Court invalidated state-mandated prayer in the classroom almost 30 years ago in *Engel v. Vitale*, 370 U.S. 421 (1962), it peered down the road to this case, and, contrary to the lower courts here, denied that the constitutional compass it was setting would put the Establishment Clause at odds with the "many manifestations in our public life of belief in God." *Id.* at 435 n.21. The *Engel* Court thus rebuffed Justice Stewart's concern, expressed in dissent, that beginning the school day with prayer is indistinguishable from opening sessions of Congress and this Court with prayer, or from invoking God's blessing at presidential inaugural ceremonies, or from countless other "official expressions of religious faith in and reliance upon a supreme Being" by institutions and officials of the federal government. *Id.* at 450 n.9. According to the *Engel* majority, "[s]uch patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance." *Id.* at 435 n.21.

Notwithstanding the *Engel* majority's confident assessment of the validity of official ceremonial references to a deity, the courts below prohibited any reference to a deity in public school graduation ceremonies on the basis of the

"effects" prong of the *Lemon* tripartite test. Both the court of appeals majority and the district court equated official reference to a deity with endorsement of religion. Because "reference to a deity necessarily implicates religion," the courts below believed that it was a "forgone conclusion" that the "Providence School Committee ha[d] in effect endorsed religion in general by authorizing an appeal to a deity in public school graduation ceremonies." App. 25a. At the same time, the courts below dismissed *Marsh* as a narrow exception to *Lemon*, extending only to official religious practices, such as legislative prayer, that were well known and broadly accepted when the First Amendment was framed in 1791 – an exception inapplicable here because the origins of public schooling in this country can be traced back only a century and a half.

Under the reasoning of the lower courts in this case, it is clear that all references to a deity, not just invocations and benedictions, must be cleansed from public school graduation ceremonies. Recitations of the Pledge of Allegiance, for example, would be forbidden. Similarly, commencement speakers would have to take care to avoid references to a deity in their remarks to the graduates. The Rev. Martin Luther King's well-known commencement address to the 1961 graduating class of Lincoln University could not, consistent with the ruling below, be delivered at the 1991 graduation ceremony of a Providence public high school.⁵

But this is not all. For the reasoning of the courts below cannot be confined to public school graduation ceremonies. The invocation and benediction at issue in this case are but a single and unremarkable manifestation of the venerable and

⁵ King's speech contained a number of references to the deity, and he concluded his commencement address with the same stirring words later made famous in his "I Have A Dream" speech delivered from the steps of the Lincoln Memorial on August 28, 1963:

That will be the day when all of God's children, black men and white men, Jews and Gentiles, Catholics and Protestants, will be able to join hands and sing in the words of the old Negro spiritual, "Free at last! Free at last! Thank God Almighty, we are free at last!"

Martin Luther King, Jr., Commencement Address, Lincoln University, June 6, 1961 in 31 Negro History Bulletin 10, 15.

broad tradition of official expression of religious values in the public life of the Nation. If the courts below have correctly stated the law, then a staggering variety of ceremonial and familiar practices in our public life must be censored to exclude forbidden references to a deity, just as the district court below revised Rabbi Gutterman's invocation. Indeed, if governmental expression of religious belief is what the First Amendment forbids, Rabbi Gutterman's manifestly nonsectarian prayers at Nathan Bishop Middle School's graduation ceremony surely pale as a constitutional threat when compared to the Reverend Billy Graham's distinctly sectarian prayer to the Holy Trinity at President Bush's inauguration, a ceremony attended by the constitutional officers of all three branches of the federal government and witnessed by millions of people throughout this country and the world. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 671-72 n.9 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

By striking down a practice that is as old as American public education itself⁶ and that traditionally has been and is now incorporated in the commencement exercises of the vast

⁶ At least as early as May 31, 1804, at the first graduation ceremony of one of the nation's first public universities – the University of Georgia – The Reverend Mr. Marshall offered an invocation, and The Reverend Hope Hull concluded the proceedings with a prayer. A. Hull, *A Historical Sketch of the University of Georgia* 17-19 (1894); *Augusta [Ga] Chronicle*, June 23, 1804. At the University of Virginia, founded by Thomas Jefferson, an "Order of Exercises" dated June 26, 1850, began with prayer. J. Whitehead, *The Rights of Religious Persons in Public Education* 210 (1991). Indeed, the academic ceremonies of graduation, dating back before the founding of our country, are largely drawn from religious ceremonies. DuPuy, *Religion, Graduation and the First Amendment: A Threat or a Shadow?*, 35 Drake L. Rev. 323, 358 (1985-1986). In *Stein*, Judge Milburn observed that the courts "can take judicial notice that invocations and benedictions at public school commencements have been a traditional practice since the beginning of public schools in this country." 822 F.2d at 1410 (Milburn, J., concurring).

bulk of schools and colleges throughout the country,⁷ the lower courts' ruling forces the candid mind to question the legitimacy of the constitutional doctrine that yields so startling a result. To be sure, we argue in Part II below that the *Lemon* test does not require invalidation of graduation invocations and benedictions. But we cannot conscientiously argue that the lower courts' application of *Lemon* was unreasonable. Indeed, since the granting of the Petition for Certiorari in this case, both the California Supreme Court and the Court of Appeals for the Fifth Circuit have decided the precise issue raised here, one upholding graduation invocations and benedictions under *Lemon* and the other striking them down.⁸

⁷ Today invocations and benedictions are recognized as standard elements of graduation ceremonies. K. Sheard, *Academic Heraldry in America* 71 (1962) ("The commencement program today consists primarily of an invocation, a commencement address, the awarding of earned degrees, the awarding of honorary degrees, and the benediction."). The *Commencement Manual* of the National Association of Secondary School Principals, at 2 (1975) states that "nearly every program includes an invocation and a benediction."

⁸ Compare *Jones v. Clear Creek Indep. School Dist.*, No. 89-2638 (5th Cir. April 18, 1991) (Lexis U.S. App. 6746) (upholding graduation invocations and benedictions) with *Sands v. Morongo Unified School Dist.*, No. SO12721 (Cal. May 6, 1991) (Lexis 1724) (invalidating graduation invocations and benedictions). A number of other federal and state courts have considered the issue, and their conclusions have been mixed. Cases upholding graduation invocations and similar practices are: *Stein*, 822 F.2d 1406 (6th Cir. 1987); *Albright v. Board of Educ.*, No. 90-C-639G (D. Utah May 15, 1991); *Grossberg v. Deusebio*, 380 F.Supp. 285, 289 (E.D. Va. 1974); *Wood v. Mt. Lebanon Township School Dist.*, 342 F.Supp. 1293, 1294-95 (W.D. Pa. 1972); *Wiest v. Mt. Lebanon School Dist.*, 457 Pa. 166, 320 A.2d 362, 365-66, *cert. denied*, 419 U.S. 967 (1974). See also *Florey v. Sioux Falls School Dist.*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980) (upholding school board rules outlining school activities during Christmas assemblies); *Brandon v. Board of Educ.*, 635 F.2d 971, 979 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981) ("[W]here a clergyman briefly appears at a yearly high school graduation ceremony, no image of official state approval is created."); *Bogen v. Doty*, 598 F.2d 1110, 1111 (8th Cir. 1979) (upholding invocations at meetings of county board); *Lincoln v. Page*, 109 N.H. 30, 241 A.2d 799 (1968) (upholding invocations at town meetings); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 34 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973) (upholding posting of Ten Commandments in public building); *Opinion of the Justices*, 108 N.H. 97, 256 A.2d 161 (1967) (bill requiring the posting of "In God We Trust" in public

(Continued on following page)

The division among the lower courts on the issue of graduation prayer, however, is far from atypical in the jurisprudence that has developed under *Lemon's* tripartite test. Since its inception, the *Lemon* test has spawned a cacophony of conflicting decisions in the lower federal courts, particularly in cases involving practices with historical sanction.⁹ And candor requires us to add, respectfully, that the

(Continued from previous page)

school classrooms would be constitutional). Cases invalidating graduation invocations and similar practices are: *Lundberg v. West Monona Community School Dist.*, 731 F.Supp. 331 (N.D. Iowa 1989); *Graham v. Central Community School Dist.*, 608 F.Supp. 531 (S.D. Iowa 1985); *Doe v. Aldine Indep. School Dist.*, 563 F.Supp. 883 (S.D. Tex. 1982); *Bennett v. Livermore Unified School Dist.*, 193 Cal. App.3d, 1012, 238 Cal. Rptr. 819 (1987); *Kay v. David Douglas School Dist.*, 79 Or. App. 384, 719 P.2d 875 (1986), *rev'd on other grounds*, 303 Or. 574, 738 P.2d 1389 (1987), *cert. denied*, 484 U.S. 1032; see also *North Carolina Civil Liberties Union v. Constangy*, 751 F.Supp. 552 (W.D.N.C. 1990) (judge's practice of opening daily sessions with recitation of brief prayer was unconstitutional).

⁹ Challenges to religious imagery included in city seals illustrate this point, for such seals commonly are designed near in time to a city's founding and reflect the distinctive social, cultural, geographic, or historical roots of the community. For example, in *Johnson v. Board of County Commissioners*, 528 F.Supp. 919 (D.N.M. 1981), *rev'd sub nom. Friedman v. Board of County Commissioners of Bernalillo County*, 781 F.2d 777 (10th Cir. 1985) (*en banc*), the district court rejected an Establishment Clause challenge to a city seal, concluding that it did not have the effect of impermissibly advancing religion because it was "an iconographic illustration of the rich cultural heritage of Bernalillo County." 528 F.Supp. at 924. The Tenth Circuit nevertheless found the district court's analysis to be clearly erroneous, driven by its understanding of the *Lemon* "effects" test to observe that a "person approached by officers leaving a patrol car emblazoned with this seal could reasonably assume that the officers were the Christian police. . . ." 781 F.2d at 782. See also *Harris v. City of Zion*, 927 F.2d 1401, 1403-04 (7th Cir. 1991) (holding unconstitutional Zion's nearly century-old seal); *id.* at 1423 (Easterbrook, J., dissenting) ("Zion's seal has been in use for 89 years without stifling religious diversity. . . . Not one resident of Zion other than Harris has expressed concern."); Brief for Liberty Counsel as *Amicus Curiae* 2-18 (reviewing "chaotic, conflicting decisions in the lower courts" under the *Lemon* test).

anomalies spawned by *Lemon* have not been limited to the inferior federal courts.¹⁰ Not surprisingly, a majority of the Justices of this Court have expressed dissatisfaction with aspects of the *Lemon* test.¹¹

¹⁰ This Court has itself admitted to the "considerable internal inconsistency" in its opinions involving the Religion Clauses, *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970), and confessed that under *Lemon* it has "sacrifice[d] clarity and predictability for flexibility." *Committee for Public Educ. v. Regan*, 444 U.S. 646, 662 (1980). See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting) (setting out examples of the difficulty the Court has had in "making the *Lemon* test yield principled results"); Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 Notre Dame L. Rev. 311, 316-17 (1986) ("This scatter-pattern of decisions is the combined product of the tripartite *Lemon* test and the Court's occasional desire to provide an escape from the straitjacket that an honest application of *Lemon* would force upon society. . . ."); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 681 (1980) (noting "the absence of any principled rationale" in the Court's Religion Clause jurisprudence); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3, 20 (1978) ("Judicial discretion, rather than constitutional mandate, controls the results."). In particular, a literal application of *Lemon* would seem plainly to invalidate a number of practices which this Court has held are required by the Free Exercise Clause. Compare *Sherbert v. Verner*, 374 U.S. 398 (1963) (government may not burden an employee's free exercise rights by failing to accommodate his Sabbath observance) with *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (statute that provides employees with unqualified right not to work on their Sabbath violates the Establishment Clause).

¹¹ See *County of Allegheny v. American Civil Liberties Union*, 492 U.S. at 656 (Kennedy, J., concurring in the judgment and dissenting in part) ("Substantial revision of our Establishment Clause doctrine may be in order."); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (*Lemon* test is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results."); *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting) (expressing "doubts about the entanglement test"); *Roemer v. Board of Public Works*, 426 U.S. 736, 768 (1976) (White, J., concurring in the judgment) ("I am no more reconciled now to *Lemon* I than I was when it was decided. . . . The threefold test of *Lemon* I imposes unnecessary, and . . . superfluous tests for establishing [a First Amendment violation]."); *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("pessimistic evaluation . . . of the totality of *Lemon* is particularly applicable to the 'purpose' prong").

More telling, however, is the dissatisfaction with *Lemon* implied in the Court's decision in *Marsh*. In upholding the Nebraska Legislature's practice of opening its sessions with a prayer offered by a paid chaplain, the *Marsh* Court did not attempt the exceedingly difficult task of justifying the practice at issue under the *Lemon* test. Indeed, Justice Brennan observed in dissent that, "if the Court were to judge legislative prayer through the unsentimental eyes of our settled doctrine [i.e., the *Lemon* test], it would have to strike it down as a clear violation of the Establishment Clause." *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting). But the *Lemon* test not only is unsentimental, it is indifferent to our Nation's heritage of official ceremonial acknowledgments of religious faith, and woodenly applying its formulaic prescription would have required the *Marsh* majority to ignore the common-sense proposition on which its decision was largely premised:

It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain [to deliver opening prayers] for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.

Marsh, 463 U.S. at 790. Thus, in *Marsh*, and we submit, in this case, the *Lemon* test was ill-suited to assist the Court in its essential task, which Justice Brennan well described in *Abington School Dist. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring): "[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."

In the pages that follow, we demonstrate that the history surrounding the framing and ratification of the Establishment Clause reveals two points of controlling significance in this case. First, by making particular provision for religious liberty within the otherwise general First Amendment protection of expression, the Framers did not intend to deprecate or restrain religious expression in the life of the nation. The

Establishment Clause was not intended to operate as some sort of constitutional gag order, enjoining public officials and their invitees to omit any reference to God from civic ceremonies. To the contrary, public ceremonial acknowledgments of faith in God were welcomed and encouraged by the Founders; they, certainly no less than contemporary Americans, were "a religious people whose institutions presuppose[d] a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Second, the history of the First Amendment reveals why the Founders engaged in and encouraged official ceremonial expressions of religious faith: such references did not involve the government's coercive powers. The struggle for religious freedom in this country was animated by an overriding philosophical premise – that matters of conscience can be influenced only by reason, not force, and that in appealing to reason, "all men [should] be free to profess, and by argument to maintain, their opinion in matters of religion." *Virginia, Act for Establishing Religious Freedom* (1785), in 5 *The Founders' Constitution* 84, 85 (P. Kurland & R. Lerner eds. 1987) (hereinafter "Kurland"). The Founders did not fear expression of religious values by public officials; they feared coercion of religious values by public officials. The First Amendment was designed by the Framers to protect only against the latter.

ARGUMENT

I. The Graduation Prayers Here Did Not Violate The Establishment Clause Because They Did Not Involve Government Coercion Of Religious Conformity

A. Government Coercion Of Religious Conformity Is A Necessary Element Of An Establishment Clause Violation

1. The Philosophy Of The Founders

Among the Founders, Madison and Jefferson were "the architects of our principles of religious liberty." *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting). The blueprint, however, was in large part provided by John Locke, probably the

foremost exponent of the classical liberal philosophy of government that animated the Framers generally, and Jefferson particularly. In his *Letter Concerning Toleration*, Locke distinguishes between government coercion relating to religion, which he deemed unjustifiable, and government expression or persuasion concerning religion, which he deemed unobjectionable. Locke wrote:

The care of souls cannot belong to the civil magistrate, because his power consists only in outward force; but true and saving religion consists in the inward persuasion of the mind. . . . Confiscation of estate, imprisonment, torments, nothing of that nature can have any such efficacy as to make men change the inward judgment that they have framed of things.

It may indeed be alleged that the magistrate may make use of arguments, and thereby draw the heterodox into the way of truth, and procure their salvation. I grant it; but this is common to him with other men. . . . Every man has commission to admonish, exhort, convince another of error, and, by reasoning, to draw him into truth; but to give laws, receive obedience, and compel with the sword, belongs to none but the magistrate. And upon this ground, I affirm that the magistrate's power extends not to the establishing of any articles of faith, or forms of worship, by the force of his laws. For laws are of no force at all without penalties, and penalties in this case are absolutely impertinent, because they are not proper to convince the mind.¹²

¹² Locke, *A Letter Concerning Toleration* (1684), in Kurland, *supra* p. 14, at 52, 53. St. George Tucker in *Blackstone's Commentaries* (1803), in Kurland, *supra* p. 14, at 96, later recognized a similar distinction between unjustifiable religious coercion and unobjectionable official persuasion or recognition of religion. Tucker cites as "an axiom, concerning the human mind," that "religion, or the duty we owe to our Creator, and the manner of discharging it, can be dictated only by reason and conviction, not by force or violence." He elaborated:

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These views on religious liberty form a common thread running throughout Madison's and Jefferson's writings on the subject, and are reflected perhaps nowhere more distinctly than in Jefferson's *Notes on the State of Virginia*. Jefferson, *Notes on the State of Virginia*, Query 17, 157-61 (1784) (hereinafter "*Notes*"), in Kurland, *supra* p. 14, at 79-80. Jefferson opened by recounting that this country was settled largely by immigrants fleeing the coercion, indeed persecution, of English laws demanding their conformity to and support of the established Anglican Church. Many of those settlers, however, including those who established Virginia, "shewed equal intolerance" of differing religious faiths once they became "[p]ossessed . . . of the powers of making, administering, and executing the laws. . . ." *Id.*¹³

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In vain, therefore, may the civil magistrate interpose the authority of human laws, to prescribe that belief, or produce that conviction, which human reason rejects. . . . The martyr at the stake, glories in his tortures, and proves that human law may punish, but cannot convince

Id. at 96. Tucker further noted, however:

Statesmen should countenance [genuine religion] only by exhibiting, in their own example, a conscientious regard to it in those forms which are most agreeable to their own judgments, and by encouraging their fellow citizens in doing the same.

Id. at 97.

¹³ Legal compulsion was the hallmark of establishments in the American colonies, the colonists having adopted many of the practices that inspired their own flights from England and elsewhere in Europe. See 6 W. & A. Durant, *The Story of Civilization* 208-20, 501-506, 523-601, 631-41 (1957); L. Pfeffer, *Church, State and Freedom*, 20-30 (rev. 1st ed. 1967). Professor Joseph Brady, in a seminal historical work on the Establishment Clause, quotes historian Marcus W. Jernegan's description of the typical laws establishing state religions:

The general rule in those colonies having an established church was to require dissenters to support it by paying tithes or taxes, and also to attend the official church services under penalty. They were also frequently required to submit to various tests or oaths, and to subscribe to the creeds and catechisms of the established church. Sometimes the right to settle in a colony, or the privilege of

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In 1776, Jefferson noted, the newly independent Commonwealth of Virginia adopted a Constitution containing a Declaration of Rights with a clause guaranteeing religious liberty.¹⁴ Jefferson complained that in obedience to the Virginia Constitution's guaranty of religious freedom, the legislature had repealed only the prior acts of the English parliament compelling observance of and support for the established English church.¹⁵ The legislature did not repeal prior acts of the colonial assembly that coerced conformity to the Christian religion by, *inter alia*, disqualifying dissenters from holding public office and imposing criminal penalties. Jefferson made clear that the freedom to profess one's religious opinions publicly is integral to the freedom to have religious opinions. And the free exercise of the right to form

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naturalization, or citizenship, or the right to vote and hold office, depended on submission to religious tests.

J. Brady, *Confusion Twice Confounded: The First Amendment and the Supreme Court* 6-7 (1954). See also L. Levy, *The Establishment Clause: Religion and the First Amendment* 4 (1987).

¹⁴ The religious freedom clause of Virginia's Declaration of Rights reads as follows:

That religion, or the duty we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity toward each other.

Virginia Declaration of Rights, Section 16 (June 12, 1776), Va. Const. art. I, § 16, in Kurland, *supra* p. 14, at 70.

¹⁵ The Anglican Church of England was established in Virginia's original charter in 1606, which required all ministers in the Colony to preach Christianity according to Anglican doctrines. L. Levy, *supra* n.13, at 3. In 1611, the Colony required all citizens to attend church and observe the Sabbath, and enacted severe punishments for blasphemy, sacrilege, and criticism of the doctrine of the Trinity. *Id.* The law also required all to embrace Anglican doctrine, and to pay for the maintenance of Anglican churches and ministers. *Id.* at 3-4. Every clergyman was required to accept the Anglican Thirty-Nine Articles of Faith, and every church was required to follow the liturgy of the Church of England according to the Anglican Book of Common Prayer. *Id.* at 4.

and profess one's religious sentiments causes no injury, while subjecting that right to government coercion causes no good. As Jefferson put it:

The error seems not sufficiently eradicated, that the operations of the mind, as well as the acts of the body, are subject to the coercion of the laws. . . . The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg. . . . Constraint may make him worse by making him a hypocrite, but it will never make him a truer man. . . . Reason and free inquiry are the only effectual agents against error. . . . It is error alone which needs the support of government. Truth can stand by itself. Subject opinion to coercion: Whom will you make your inquisitors? Fallible men; men governed by bad passions, by private as well as public reasons. And why subject it to coercion? To produce uniformity. But is uniformity of opinion desirable? . . . Difference of opinion is advantageous in religion. The several sects perform the office of a Censor morum over each other. . . . What has been the effect of coercion? To make one half the world fools, and the other half hypocrites. . . . [W]e cannot effect [truth] by force. Reason and persuasion are the only practicable instruments.

Notes, in Kurland, *supra* p. 14, at 79-80.

2. The Fight For Religious Liberty In Virginia

In 1779, Jefferson drafted an "Act for Establishing Religious Freedom." This Court has often recognized that the history surrounding the Virginia General Assembly's enactment in 1786 of Jefferson's bill accurately reflects "the long and intensive struggle for religious freedom in America" and is "particularly relevant in the search for the First Amendment's meaning." *McGowan v. Maryland*, 366 U.S. 420, 437 (1961). The Religious Freedom Act was aimed specifically at government coercion in the form of (1) taxation for the

support of religion; (2) religious tests for holding public office; and (3) government restraints on the propagation of religious beliefs. The Act's substantive provision reads as follows:

[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or beliefs; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

Virginia, Act for Establishing Religious Freedom, in Kurland, *supra* p. 14 at 85.

As Judge Easterbrook has noted, the Act "does not protest government use of persuasion on matters religious; it is concerned with compulsion alone." *American Jewish Congress*, 827 F.2d at 135 (Easterbrook, J., dissenting). Indeed, far from protesting government use of persuasion on religious matters, the Act guarantees to "all men" freedom of religious expression. "All men" clearly includes those holding public office, for an essential purpose of the Act was to render religious belief and expression irrelevant to one's "civil capacities," such as the ability to seek and hold public office.¹⁶ That government and government officials are no

¹⁶ While the language of the Act's substantive provision admits of no doubt on this point, the preamble speaks directly to the issue as well:

[O]ur civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; . . . therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right; . . . it tends only to corrupt the principles of that religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it

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less free than ordinary citizens to express religious opinions is thus clear from the Act's substantive protections. But if any doubt persists on this point, it is foreclosed by the Act's preamble, which itself contains a full-bodied expression of religious belief, arguing in effect that the principles reflected in the Act were Divinely inspired. The preamble provides in pertinent part:

Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do

Virginia, Act for Establishing Religious Freedom, in Kurland, *supra* p. 14, at 84. If Rabbi Gutterman's invocation in this case violated the Establishment Clause, then Virginia's enactment of the Act for Establishing Religious Freedom was itself an establishment of religion, and if reenacted today, Jefferson's preamble would have to be deleted. See *American Jewish Congress*, 827 F.2d at 136 (Easterbrook, J., dissenting).

Jefferson's Religious Freedom Act was not enacted until 1786, in the aftermath of Patrick Henry's unsuccessful attempt to pass "A Bill Establishing A Provision for Teachers of the Christian Religion" ("Assessment Bill").¹⁷ Henry's bill was "nothing more nor less than a taxing measure for the support of religion, designed to revive the payment of tithes suspended since 1777." *Everson v. Board of Educ.*, 330 U.S. 1, 36 (1947) (Rutledge, J., dissenting). The Assessment Bill permitted each taxpayer to designate which Christian church would receive his payment, and in default of a designation,

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Virginia, Act for Establishing Religious Freedom, in Kurland, *supra* p. 14, at 84.

¹⁷ The Bill appears in *Everson v. Board of Educ.*, 330 U.S. 1, 72-74 (1947) (Appendix to Opinion of Rutledge, J., dissenting).

the taxes were paid into a public fund to aid "seminaries of learning." *Id.*

Madison led the opposition to the Assessment Bill, briefing the arguments against it in his famed *Memorial and Remonstrance Against Religious Assessments*.¹⁸ Madison, *Memorial and Remonstrance Against Religious Assessments* (1785) in Kurland, *supra* p. 14, at 82-84. The *Memorial and Remonstrance* is a bill of particulars against the use of government power to coerce support of religion. Madison's main arguments against the Assessment Bill sprang from a common theme, stated in his preamble: that the Bill, "if finally armed with the sanctions of a law, will be a dangerous abuse of power" *Id.* at 82.

In his lead argument against the measure, Madison invoked the Lockean postulate, enshrined in Virginia's Declaration of Rights, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." *Id.* ¶ 1. Freedom of religion, being "in its nature an unalienable right," wrote Madison, is not abridged by one's membership in "Civil Society," and thus is subject neither to "the will of the majority" or "to that of the Legislative Body." *Id.* ¶¶ 1, 2. Madison warned that a government "which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." *Id.* ¶ 3 (emphasis added). He argued further that "compulsive support" of religion frustrates rather than maintains "the purity and efficacy of Religion," noting that historically religion had flourished "without the support of human laws," while "ecclesiastical establishments" had led to religious "superstition, bigotry and persecution." *Id.* at 82-83 ¶¶ 4, 6, 7 (emphasis added). Finally, Madison warned against arming the proposed Bill "with the force of a law," and argued that "attempts to

¹⁸ Justice Rutledge characterized the *Memorial and Remonstrance* as "the most concise and the most accurate statement of the views of the First Amendment's author concerning what is 'an establishment of religion.'" *Everson*, 330 U.S. at 37 (Rutledge, J., dissenting).

enforce by legal *sanctions*" measures as widely unpopular as the Assessment Bill would "tend to enervate the laws in general." *Id.* at 83-84 ¶¶ 11, 13 (emphasis added).

For Madison, the evil of the Assessment Bill was its proposed use of government power to coerce support of religion, which he saw as the *sine qua non* of an "establishment." Nowhere in his *Memorial and Remonstrance* did he voice concern about expression of religious beliefs by government or its officials. To the contrary, not only did he extol the "freedom to embrace, to profess and to observe" religious beliefs (*id.* at 82 ¶ 4), he exercised that freedom in the *Memorial and Remonstrance* itself, closing it with a prayer to "the Supreme Lawgiver of the Universe."¹⁹

The *Memorial and Remonstrance* not only brought about the defeat of the Assessment Bill, it also generated popular support for Jefferson's Religious Freedom Bill, which passed in January 1786. Many years later, Madison praised the Religious Freedom Bill as "a true standard of Religious liberty," describing it as follows: "Here the separation between the authority of human laws, and the natural rights of Man excepted from the grant on which all political authority is founded, is traced as distinctively as words can admit, and the limits to this authority established with as much solemnity as the forms of legislation can express." Madison, *Detached Memoranda* (1817) (hereinafter "*Detached Memoranda*"), in Kurland, *supra* p. 14, at 103.

¹⁹ Madison prayed

[t]hat the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their Councils from every act which would affront his holy prerogative, or violate the trust committed to them: and on the other guide them into every measure which may be worthy of his blessing, may redound to their own praise and may establish more firmly the liberties, the prosperity, and the happiness of the Commonwealth.

Id. ¶ 15.

3. The Framing Of The Establishment Clause

Following hard on the heels of this experience in Virginia were the debates in the First Congress over the Establishment Clause of the First Amendment. Madison, a member of the House of Representatives from Virginia, again played the leading role. The debate in the States over ratification of the Constitution had centered on the Constitutional Convention's failure to include a bill of rights. Opposition to the Constitution was led by the Anti-Federalists, who believed that a bill of rights was essential to preserving individual liberties against encroachment by the national government. Supporters of ratification, the Federalists, argued that a bill of rights was unnecessary because the national government lacked the delegated power to act in a manner that would violate their religious and other civil liberties. Still, two states – Rhode Island and North Carolina – refused to ratify the Constitution in the absence of amendments in the nature of a bill of rights, and three of the ratifying states – New Hampshire, New York, and Virginia – proposed that an amendment guaranteeing religious freedom be offered by the First Congress.²⁰ 3 J. Elliot, *Debates on the Federal Constitution* 659 (1891); 1 *id.* at 328.

Madison took the lead in introducing a set of proposed amendments in the House of Representatives, including the following proposal concerning religious freedom: "The Civil Rights of none shall be abridged on account of religious

²⁰ The Virginia proposal was typical:

That religion, or the duty which we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force and violence and therefore all men have an equal, natural and inalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by law in preference to others.

Virginia Ratifying Convention, Proposed Amendments (1788), in Kurland, *supra* p. 14, at 89. North Carolina proposed an identical amendment, and New York and Rhode Island quite similar ones. See 4 J. Elliot, *Debates on the Federal Constitution* 244, 334 (1891). New Hampshire proposed an amendment stating: "Congress shall make no laws touching religion or to infringe the rights of conscience." 1 *id.* at 362.

belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 Annals of Cong. 451 (J. Gales ed. 1834). Madison's proposals were referred to a Select Committee consisting of Madison and ten others. The Committee ultimately reported out the following language: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.* at 729.

The debate over this proposal in the House was not extensive. Madison's comments make clear, however, that the purpose of the proposed amendment was to protect against government *coercion* of religious observance or support. Madison advised his colleagues that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and *enforce* the legal observation of it by law, nor *compel* men to worship God in any manner contrary to their conscience." *Id.* at 730, in Kurland, *supra* p. 14, at 93 (emphasis added). Representative Benjamin Huntington agreed with Madison's understanding of the amendment's meaning, but feared that "others might find it convenient to put another construction upon it." He suggested that it might be construed to prevent enforcement in federal court of private pledges to contribute to the support of a minister or a church building. *See id.* at 730-31, in Kurland, *supra* p. 14, at 93. Madison answered that insertion of the word "national" before the word "religion" in the proposal would "point the amendment directly to the object it was intended to prevent." *Id.* at 731, in Kurland, *supra* p. 14, at 93. That object, according to Madison, was that "one sect might obtain a preeminence, or two combine together, and establish a religion to which they would *compel* others to conform." *Id.*, in Kurland, *supra* p. 14, at 93 (emphasis added).²¹

²¹ Representative Elbridge Gerry attacked Madison's suggested insertion of the word "national" as supporting the claim of the Anti-Federalists, made in state ratifying conventions, that the Federalists favored a "national" government rather than a federal one. Madison withdrew his suggestion. 1 Annals of Congress 731, in Kurland, *supra* p. 14, at 93. Representative Samuel Livermore of New

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The debates in the Senate were secret, and there is no record of any further debate on the Religion Clauses in the House. *Wallace v. Jaffree*, 472 U.S. at 97 (Rehnquist, J., dissenting). And while the proposed amendment was revised several times before the House and Senate finally agreed on the language that ultimately became the First Amendment (*see id.*), none of the changes affected Madison's points about the intended meaning of the Establishment Clause. *American Jewish Congress*, 827 F.2d at 136 (Easterbrook, J., dissenting).

Thus according to the chief architect and sponsor of the First Amendment in the First Congress, the Establishment Clause was designed to protect against laws²² *compelling* conformity in matters of religion. No one disagreed with Madison's statements concerning the intended meaning of the provision. Indeed, the debate in the House over the wording of the amendment did not question the intended meaning of the amendment — on that issue Madison's view was accepted as common ground. Rather, the debate over the Establishment Clause focused on the concern that the proposed language might be construed to *go beyond* the meaning ascribed to it by Madison.

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Hampshire moved that the proposed language be altered to echo that proposed by his state's ratifying convention: "Congress shall make no laws touching religion, or infringing the rights of conscience." *Id.* Livermore's motion carried. *Id.*

²² Indeed, the use of the word "law" in the Establishment Clause underscores the Framers' intent to prohibit coercive practices. ("Congress shall make no law . . ."). A law by definition involves a binding obligation backed by compulsion. *Zwerling v. Reagan*, 576 F. Supp. 1373, 1376-78 (C.D. Cal. 1983) ("Fundamental to the existence of a law is the obligation it creates and the sanction it imposes. It is a matter of compulsion and does not take the nature of a plea, suggestion or request."). *See also American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) ("Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts."); *United States Fidelity & Guaranty Co. v. Guenther*, 281 U.S. 34, 37 (1930) (defining law "as meaning the rules of action or conduct duly prescribed by controlling authority, and having binding legal force.").

But whatever else may be said about the views of the First Congress concerning the meaning of the Establishment Clause, this much is clear: the Framers of the First Amendment did not conceive that constitutional protection against government establishments of religion would forbid the expression of religious opinions by government or its officials. While there was no discussion on this issue among the Founders at the time of the framing of the First Amendment, evidence of their views on it abounds nonetheless. For "their actions reveal their intent." *Marsh*, 463 U.S. at 790.

4. The Conduct Of The Founders

As this Court has often recognized, our Nation's tradition of official ceremonial expressions of religious beliefs dates back to its inception. See, e.g., *Marsh v. Chambers*, 463 U.S. at 787-88; *Lynch v. Donnelly*, 465 U.S. 668, 673-74 (1984). America was founded on an appeal "to the Supreme Judge of the world" and to "the laws of nature and of nature's God." The Declaration of Independence also proclaimed that all men "are endowed by their Creator with certain inalienable rights," and relied on "the protection of Divine Providence." George Washington, in his first inaugural address, sought the blessings of God, "that Almighty Being" and "the Great Author of every public and private good." Indeed, Washington thought "it would be peculiarly improper to omit in [his] first official act [his] fervent supplications to that Almighty Being who rules over the universe" ²³ Almost without exception, Washington's successors in office, up to and including President Bush, ²⁴ have included in their inaugural

²³ George Washington, First Inaugural Address, April 30, 1789, in *Inaugural Addresses of the Presidents of the United States from George Washington, 1789 to George Bush, 1989* at 1, 2 (Bicentennial ed. 1989) (hereinafter cited as "*Inaugural Addresses of the Presidents*").

²⁴ And my first act as President is a prayer. I ask you to bow your heads: Heavenly Father, we bow our heads and thank You for Your love. Accept our thanks for the peace that yields this day and the shared faith that makes its continuance likely. Make us strong to do Your

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addresses statements of religious sentiment and supplications for God's assistance in discharging their official obligations. Indeed, the inaugural addresses of both Thomas Jefferson (at both his first²⁵ and second²⁶ inaugural ceremonies) and James Madison²⁷ contain moving expressions of religious faith.

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work, willing to heed and hear Your will, and write on our hearts these words: "Use power to help people." For we are given power not to advance our own purposes, nor to make a great show in the world, nor a name. There is but one just use of power, and it is to serve people. Help us remember it, Lord. Amen.

George Bush, Inaugural Address, January 20, 1989, in *Inaugural Addresses of the Presidents*, *supra* n.23, at 345, 346.

²⁵ Kindly . . . enlightened by a benign religion, professed, indeed, and practiced in various forms, yet all of them inculcating honesty, truth, temperance, gratitude, and the love of man: acknowledging and adoring an overruling Providence, which by all its dispensations provides that it delights in the happiness of man here and his greater happiness hereafter And may that Infinite Power which rules the destinies of the universe lead our councils to what is best, and give them a favorable issue of your peace and prosperity.

Thomas Jefferson, First Inaugural Address, March 4, 1801, in *Inaugural Addresses of the Presidents*, *supra* n.23, at 13, 15, 17.

²⁶ I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessities and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, guide their councils, and prosper their measures that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations.

Thomas Jefferson, Second Inaugural Address, March 4, 1805, in *Inaugural Addresses of the Presidents*, *supra* n.23, at 18, 22-23.

²⁷ In these my confidence will under every difficulty be best placed, next to that which we have all been encouraged to feel in the guardianship and guidance of that Almighty Being whose

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At the conclusion of Washington's inauguration ceremony, the new President and both Houses of Congress attended a religious service conducted by the First Episcopal Bishop of New York at St. Paul's Chapel in New York City, in accordance with a joint congressional resolution providing for the service. See A. Stokes & L. Pfeffer, *Church and State in the United States* 87 (rev. 1st ed. 1964).

On the day after the House of Representatives of the First Congress voted to adopt the Establishment Clause, the House adopted a resolution requesting President Washington to proclaim "a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God." *Lynch*, 465 U.S. at 675 n.2. Washington responded by proclaiming November 26, 1789, as a day of thanksgiving in which to offer "our prayers and supplications to the Great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions." *Id.* Washington issued a similar proclamation of thanksgiving in 1795, and this practice was followed by President John Adams, who issued two such proclamations, and President Madison, who issued four.²⁸ R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 53 (1982). This tradition has been continued throughout our history by virtually every President, with the exception of Jefferson.²⁹

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power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future.

James Madison, First Inaugural Address, March 4, 1809, in *Inaugural Addresses of the Presidents*, *supra* n.23, at 25, 28.

²⁸ Madison later questioned the wisdom, not the constitutionality, of his practice as President of issuing Thanksgiving proclamations. See *Detached Memoranda*, in Kurland, *supra* p. 14, at 105; *American Jewish Congress*, 827 F.2d at 136 (Easterbrook, J., dissenting).

²⁹ We discuss Jefferson's refusal to issue such proclamations at pp. 32-34, *infra*.

Lynch, 465 U.S. at 675 n.2; 3 A. Stokes, *Church and State in the United States* 180-93 (1950).

The First Congress also adopted the policy, followed ever since, of opening daily sessions of the House and Senate with prayers by an official chaplain. *Marsh*, 463 U.S. at 787-88. Madison was a member of the House Committee that proposed the policy, and he voted in favor of the bill authorizing it. *Id.* at 788 n.8.³⁰ The chaplaincy practice was also followed by the Continental Congress from its inception in 1774. *Marsh*, 463 U.S. at 786-87.

Congress's early chaplains not only opened daily sessions with prayer, they conducted Sunday worship services in the hall of the House of Representatives. Beginning around 1800, the House of Representatives authorized the use of its hall for regular Sunday religious services performed by congressional chaplains or by visiting ministers. 1 Stokes, *Church and State in the United States* 499-507 (1st ed. 1950). Both Jefferson and Madison often attended these services while serving as President. *Id.* at 499, 501.

Nor did the First Congress hesitate to reenact the Northwest Ordinance of 1787, which provided that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Wallace v. Jaffree*, 472 U.S. at 100 (Rehnquist, J., dissenting).

Ceremonial references to God have not been limited to the political branches of the federal government. This Court's own sessions have been opened by the Crier with the invocation "God save the United States and this Honorable Court" at least since the time of Chief Justice Marshall. See *Engel v. Vitale*, 370 U.S. 421, 446 (1962) (Stewart, J., dissenting). It is also noteworthy that Chief Justice John Jay, in March 1790

³⁰ Madison subsequently came to the view that paying congressional chaplains out of taxpayer funds violated the Establishment Clause. See *Detached Memoranda*, in Kurland, *supra* p. 14, at 104. Madison's constitutional objection to the chaplaincy system was apparently limited to the issue of tax support, although he also criticized the practice of opening Congress' sessions with a prayer by a chaplain as a violation of "equal rights." See *id.*

advised district court Judge Richard Law that the custom in New England courts of having a clergyman attend court sessions as chaplain "should in my opinion be observed and continued" during sessions held by Chief Justice Jay as circuit justice. 2 *The Documentary History of the Supreme Court of the United States, 1799-1800* 13 (1990).

5. The Founders' Understanding of The Establishment Clause

What this Court said in *Marsh* is equally apt here: "In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress – their actions reveal their intent." *Marsh*, 463 U.S. at 790.³¹ Against the historical backdrop described above, it cannot reasonably be maintained that the Framers of the First Amendment intended the Establishment Clause to prohibit official expressions of religious sentiments – a practice that they freely engaged in and

³¹ The courts below evaded the lessons of the framing of the First Amendment by denying the relevance of that history to this case. They dismissed *Marsh* as a narrow exception to *Lemon* for official religious practices, such as legislative prayer, that were common in 1791 and were specifically approved by the First Congress. Thus, because public education did not become a part of our accepted traditions until the mid-19th Century, the *Marsh* case, according to the courts below, is inapposite here. But the history of legislative prayer not only reveals that the Framers of the Establishment Clause likely did not intend the Clause to forbid that specific practice; it also provides broader insight into what the First Congress intended the words "an establishment of religion" to mean. See *County of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part). In other words, the history surrounding the framing of the Establishment Clause (or any other constitutional provision) has both a retail and a wholesale significance. And any interpretation of the Clause faithful to its intended meaning "must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion." *Id.* The contrary view advanced in this case by the courts below is on the order of saying that the Fourth Amendment does not reach electronic surveillance, that the Commerce Clause does not embrace interstate motor carriage, or that the First Amendment does not extend to the electronic media.

encouraged as public officials before, during, and after the framing of the Amendment itself.³² To the contrary, this conduct of the Founders reflected their intentions concerning the Establishment Clause, which in turn reflected their philosophical beliefs concerning the proper relationship between religion and government.

As previously discussed, those who led the fight for religious freedom that culminated in ratification of the First Amendment valued truth above all else, in spiritual no less than political matters. "Truth can stand by itself," said Jefferson, "error alone . . . needs the support of government." *Notes*, in Kurland, *supra* p. 14, at 80. The Founders knew that an "establishment" of religion could neither arise nor survive without government coercion, and that it would perish wherever men were "free to profess, and by argument to maintain, their opinion in matters of religion." *Virginia, Act for Establishing Religious Freedom*, in Kurland, *supra* p. 14, at 85. A simple statement of religious belief cannot coerce adherence by others. In Jefferson's vivid formulation, "[i]t neither picks my pocket nor breaks my leg." *Notes*, in Kurland, *supra* p. 14,

³² Contrary to Judge Bownes' suggestion, App. 11a, this Court did not hold in *Edwards v. Aguillard*, 482 U.S. 583 n.4, that the "historical approach" taken in *Marsh* is inapplicable in the public schooling context. After noting that legislative prayer was upheld in *Marsh* on the basis of "historical acceptance of the practice," the *Edwards* Court stated: "Such a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the constitution was adopted." *Id.* This observation means only that because public education did not exist at the time of the Founding, there can be no historical acceptance of a practice relating to public education that would support the constitutionality of the practice. The observation in *Edwards* surely does not stand for the remarkable proposition that the constitutional history surrounding practices common in 1791 is without significance to the resolution of constitutional challenges to closely analogous innovations in 1991. In addition, it seems doubtful that the courts below would find that the historical circumstances surrounding the framing of the Establishment Clause limit the practices *prohibited* by the Clause in the same manner that the courts below believe those historical circumstances limit the practices *permitted* under the Clause. In other words, the courts below no doubt would agree that the First Amendment *prohibits* modern methods of establishing a religion no less than it prohibits ancient ones.

at 80. This is no less true of the religious expressions of government and its officials, so long as neither employs the state's coercive powers.

In none of the historical examples discussed above did the religious expressive activities involve an attempt to use government power to *coerce* religious conformity. No one was required to attend the inaugural ceremonies of Presidents Washington, Jefferson, or Madison, and those who chose to attend were in no way required to accept or support the religious sentiments expressed by the speakers. No one was required to give thanks on the day designated for that purpose in the proclamations of President Washington and his successors, and those who chose to do so were in no way required to accept or support the religious beliefs professed by the proclamation's author. No one, legislator or citizen, was required to attend the chaplain's invocations opening sessions of Congress, nor to accept or support the religious beliefs expressed by the chaplain.³³ Because these expressive activities did not *coerce* religious conformity, the Founders engaged in them without fear that they violated the Establishment Clause.

Thus, the history surrounding the proposal, framing, and ratification of the Establishment Clause leads to this conclusion: the "wall of separation" between religion and government erected in the First Amendment was not understood or intended by the Framers to be a quarantine, so thoroughly isolating God from civic life that even acknowledgments of His existence were forbidden. Rather, the Establishment Clause was intended to separate, and thus to protect, religion from the *coercive* power of government.

6. Jefferson's "Wall of Separation"

None of the Founders disagreed with this understanding of the Establishment Clause, including the author of the

³³ Indeed, Madison noted that the "daily devotions" opening congressional sessions had "degenerat[ed] into a scanty attendance, and a tiresome formality." *Detached Memoranda*, in Kurland, *supra* p. 14, at 104.

famous "wall of separation" metaphor. Indeed, Jefferson's letter to the Danbury Baptist Association is a concise summary of the central philosophical precepts on which he had elaborated at greater length in his earlier *Notes on the State of Virginia*, see *supra* at 16-18.³⁴

The nature of Jefferson's "wall of separation between Church and State" is illuminated by the following statement appearing earlier in the same sentence of his Danbury letter: "the legislative powers of government reach actions only, and not opinions" Danbury Letter, in Kurland, *supra* p. 14, at 96. This statement, versions of which recur throughout Jefferson's writings on this subject, makes clear his view that the evil from which the church was constitutionally separated was not the State *qua* state, but rather the State's "legislative powers" – its powers to coerce. One cannot read Jefferson's other, more elaborate writings on the relationship between religion and government and fail to grasp this essential distinction.

While Jefferson's refusal to issue Thanksgiving proclamations as President would, at first blush, appear inconsistent with this point, he explained his decision precisely in terms of coercion. In a letter to Rev. Samuel Miller, President Jefferson stated that he had no authority "to prescribe" or "to direct" the "religious exercises of his constituents." Letter from Thomas Jefferson to Rev. S. Miller (Jan. 23, 1808) (hereinafter "Letter to Miller"), in Kurland, *supra* p. 14, at 98, 98-99. Jefferson disagreed with the argument that a Thanksgiving proclamation would be merely recommendatory: "It must be meant too that this recommendation is to carry some authority, and to be sanctioned by some penalty on those who disregard it; not indeed of fine and imprisonment, but of some degree of proscription perhaps in public opinion." *Id.* at 99. Jefferson made a similar point in his second inaugural address: "In matters of religion I have considered that

³⁴ The letter opens with the statement "that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions" Letter from Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802) (hereinafter "Danbury Letter"), in Kurland, *supra* p. 14, at 96.

its free exercise is placed by the Constitution independent of the powers of the General Government. I have therefore undertaken on no occasion, to *prescribe* the religious exercises suited to it. . . . " *Inaugural Addresses of the Presidents*, *supra* n.23, at 20 (emphasis added). Elsewhere in his second inaugural address, as previously discussed, *supra* n.26, Jefferson expressed his own religious sentiments and movingly sought God's blessings.

These statements make clear that Jefferson refrained from issuing Presidential Thanksgiving proclamations because he viewed them as coercive and thus "interdicted by the Constitution." Letter to Miller, in Kurland, *supra* p. 14, at 98. He obviously entertained no such objection to presidential expressions of personal religious belief, such as that contained in his second inaugural address. Thus, while one may disagree with Jefferson's view that a recommendatory Thanksgiving proclamation would nonetheless be coercive (as did the other Founders, and as we do below), one cannot disagree that Jefferson believed coercion to be a necessary element of a First Amendment violation.³⁵

7. This Court's Decisions Prior To *Engel*

That government coercion of religious conformity was understood by the Framers to be a necessary element of an Establishment Clause violation should not startle the modern legal mind. Rather, until this Court's decision in *Engel*, the question of government coercion had been central to this Court's Establishment Clause jurisprudence. See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 453 (1961) ("We do not hold that Sunday legislation may not be a violation of the 'Establishment' Clause if it can be demonstrated that its

³⁵ Jefferson, in his second inaugural address, asked his countrymen to join him in "supplications" to God, which seems puzzling in light of his refusal to make similar requests in presidential Thanksgiving proclamations. Additionally, Jefferson had a federalism reason for refusing to issue Thanksgiving proclamations. He believed that authority to "prescribe" religious exercises was reserved to the states. See Letter to Miller, in Kurland, *supra* p. 14, at 98-99; *Inaugural Addresses of the Presidents*, *supra* n.23, at 20.

purpose . . . or its operative effect – is to use the States's coercive power to aid religion."); *Zorach v. Clauson*, 343 U.S. 306, 311 (1952) ("If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take religious instruction, a wholly different case would be presented."); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 209 (1948) ("The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects."); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (The Establishment Clause "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship.").

Though *Engel* itself involved government coercion, 370 U.S. at 430-31, the Court's *dictum* that the purposes underlying the Establishment Clause "go much further" than prohibiting official coercive influence on religious belief, *id.* at 431, severed the key principle to which prior caselaw had been anchored. As we noted at the outset, the *Engel* Court did not intend to place the Establishment Clause on a collision course with the "many manifestations in our public life of belief in God." *Id.* at 435 n.21. But by breaking the link to coercion, *Engel* set the Establishment Clause on a path not imagined by that Court, to *Lemon* and judicial supervision over the location and relative size of creches, candy canes, talking wishing wells, Christmas trees, etc., etc., in official Christmas holiday displays.

As we will show below, *Lemon* and its progeny do not require invalidation of the graduation prayers challenged here. We turn first, however, to the question whether the Establishment Clause's safeguard against government coercion of religious conformity was violated by the invocation and benediction offered by Rabbi Gutterman.

B. There Was No Government Coercion In This Case.

We do not doubt that "[s]peech may coerce in some circumstances" *County of Allegheny*, 492 U.S. at 661

(Kennedy, J., concurring in the judgment in part and dissenting in part). But this case discloses no government action coercing religious conformity. Neither respondent nor his daughter were required to attend the graduation ceremony at Nathan Bishop Middle School, and, once there, they were in no way compelled, or even encouraged, to conform to the religious beliefs expressed by Rabbi Gutterman. Indeed, respondent has never claimed otherwise. Rather, his complaint is that he "is opposed to and offended by the inclusion of prayer in the public school graduation ceremony of his child both at the middle school and the high school level." J.A. 5. See also J.A. 18. Moreover, neither the district court nor the court of appeals suggested, much less found, that Providence school officials had engaged in even indirect coercion of anyone's religious beliefs. See App. 1a-30a.

Thus, this case came before the district court with no evidence even of "subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing." *County of Allegheny*, 492 U.S. at 659-60 (Kennedy, J., concurring the judgment in part and dissenting in part). Nevertheless, in the eyes of the district court, the simple "union of prayer, school, and important occasion" yielded an identification of religion with the public school, and so an Establishment Clause violation. App. 24a. As we show below, however, the combination of religious expression and the particular setting here cannot result in any government infringement of religious liberty prohibited by the Constitution. Religious speech alone cannot amount to the kind of government coercion of religious choice that implicates the Establishment Clause. And the setting here, a public secondary school commencement ceremony, does not add any of the coercive elements that could realistically turn Rabbi Gutterman's expressions of religious sentiment into instruments of religious compulsion.

1. Speech Alone Cannot Coerce Religious Choice

It bears repeating that the Framers themselves freely engaged in religious speech at the same time they were disabling government from using its power to coerce religious choice. Indeed, the Framers often used religious speech in the very instruments by which they disabled government's power to interfere with religious liberty. See, e.g., *Virginia Act for Establishing Religious Freedom*, in Kurland, *supra* p. 14, at 84. Clearly, the Framers were animated by the proposition, in Judge Easterbrook's modern phrasing, that "[s]peech is not coercive; the listener may do as he likes." *American Jewish Congress*, 827 F.2d at 132 (Easterbrook, J., dissenting). Though the Constitution may "prevent the government from using force or funds to aid or inhibit the practice of religion," at the same time "the government may participate as a speaker in moral debates, including religious ones." *Id.* Consistent with this notion, this Court has held that the government may encourage what it may not compel. *Harris v. McRae*, 448 U.S. 297 (1980), and may critically label expression that it may not otherwise burden, *Meese v. Keene*, 481 U.S. 465 (1987). See also *Block v. Meese*, 793 F.2d 1303, 1314 (D.C. Cir. 1986) (quoting L. Tribe, *American Constitutional Law* 588, 590 (1978)) ("[T]he guarantee of freedom of speech 'does not mean that government must be ideologically 'neutral,' or 'silence government's affirmation of national values,' or prevent government from 'add[ing] its own voice to the may that it must tolerate.'").

Respondent's effort to silence speech that "offends" him is limited by no principle save each listener's unique sensibilities. It reduces to a rule that all "government speech about religion is *per se* suspect." *County of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part). If that is the operative principle of the Establishment Clause, all references to God and to religion will have to be removed from civic life. "The holidays, the chaplains, the proclamations, the slogans, the oath, the pledge, and the creche alike give offense - to those of other faiths (or no faith) who feel slighted, to those of the same

faith who believe that governmental involvement with religion diminishes both institutions, to those who see the camel's nose." *American Jewish Congress*, 827 F.2d at 133 (Easterbrook, J., dissenting).³⁶

Again, we do not deny that "[s]peech may coerce in some circumstances," *County of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part) (emphasis added), but it is only by virtue of the particular circumstances surrounding speech that government expression may be transformed into a power to interfere unconstitutionally with religious choice. Thus, in *Abington School Dist.*, 374 U.S. at 223, Bible reading was "prescribed as part of the curricular activities of students who are required by law to attend school." In *Illinois ex rel. McCollum*, 333 U.S. at 209-10, students "compelled by law to go to school for secular education [were] released in part from their legal duty upon condition that they attend the religious classes." And in *Engel*, 370 U.S. at 430, children were similarly compelled by law to attend class, presented with a state-composed prayer, and given an option to be excused from its recitation — an option available in the circumstances only at the price of the "ridicule and ostracism of their peers for nonconformity." *American Jewish Congress*, 827 F.2d at 134 (Easterbrook, J., dissenting).³⁷

³⁶ Moreover, grounding a restraint of religious expression on the offense that may be taken by a listener is radically alien to this Court's First Amendment jurisprudence protecting other forms of speech. See, e.g., *Boos v. Barry*, 485 U.S. 312, 322 (1988) ("[I]n public debate our own citizens must tolerate insulting, even outrageous, speech. . . ."); *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988) (noting the Court's "longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience"). As Justice Harlan noted, "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576 (1969). Given that the First Amendment singles out a particular form of speech, religious expression, for special protection, it would be an odd result indeed to exclude religious speech from the scope of this principle that safeguards all other forms of expression.

³⁷ Looking to context to evaluate unconstitutional coercion is a familiar approach of this Court in many other areas outside of Establishment Clause

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In short, the facts that religious speech occurred on a government platform, was uttered by a government-sponsored speaker, and offended one (at least) member of the audience cannot by itself work a violation of the Establishment Clause.

2. Attendance At The Graduation Ceremony Was Voluntary

The setting in which the religious speech occurred here reveals no government "pressure upon a student to participate in a religious activity." *Board of Educ. v. Mergens*, 110 S.Ct. 2356, 2378 (Kennedy, J., concurring in part and concurring in the judgment). Attendance at the Nathan Bishop Middle School's graduation ceremony was entirely voluntary. J.A. 18.³⁸

This case is thus unlike the classroom prayer context at issue in *Engel*. There, the state used its coercive power to compel attendance of students in the classroom. To be sure, nonattendance for religious reasons was excused if the student was willing to endure the stigma of nonconformity associated with leaving the class. The student was put to this difficult choice by virtue of the state's mandatory attendance requirement, because the student was required to be present in the classroom in the first instance. In other words, the costs to

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jurisprudence. In *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), for example, the availability of criminal sanctions for distribution of allegedly pornographic material and government officials' threats to institute criminal proceedings resulted in "a scheme of state censorship effectuated by extralegal sanctions." *Id.* at 72. To determine when official action constitutes a Fourth Amendment seizure, courts must "assess the coercive effect of police conduct." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988). A seizure occurs "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.*, quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

³⁸ This fact has figured prominently in lower court decisions rejecting Establishment Clause challenges to public school graduation prayers. See, e.g., *Albright*, slip op. at 16 (secondary school graduation invocations and benedictions delivered in "voluntary and non-coercive circumstances"); *Wood*, 342 F.Supp. at 1295 ("[T]he fact that the graduation ceremony is not compulsory strips the function of any semblance of governmental establishment or even condonation.").

the student of leaving the classroom during the morning prayer (e.g., stigma, embarrassment, ostracism) were directly attributable to the state's law requiring the student's presence in the classroom in the first place. Absent the mandatory attendance requirement, there would be no government coercion. See *Mergens*, 110 S.Ct. at 2372 ("[T]here is little if any risk of official state . . . coercion where no formal classroom activities are involved.").

In contrast, graduates of the Nathan Bishop Middle School, as well as other schools in the Providence school district, were entirely free to stay away from the graduation ceremony; attendance was wholly voluntary. The coercive power of the state was not implicated at all.

Of course, graduates and their parents typically have a strong desire to attend their commencement exercises.³⁹ But a personal desire, no matter how strong or understandable, to attend some civic ceremony or function – whether it be a public school graduation ceremony, an inauguration ceremony or investiture, a legislative or judicial session, or whatever – simply does not amount to government compulsion to attend the event. Many people came from all over the country, some at great expense and personal sacrifice, to attend President Bush's inauguration ceremony. Still, no one was compelled by the government to attend the event. Those who did, did so voluntarily, despite the fact that the newly elected President would likely continue the inaugural tradition of seeking God's blessing. The strength of respondent's desire to attend his daughter's graduation ceremony does not entitle him to exclude from the proceedings any religious speech that he may find objectionable. A contrary rule would essentially

³⁹ In *Smith v. Board of Educ.*, 844 F.2d 90 (2d Cir. 1988), an Orthodox Jewish senior, unable to attend his high school's Saturday commencement exercises due to religious structures, sought to compel a change in the day of the event. Noting that attending graduation was not a prerequisite to a student receiving a diploma, the Second Circuit rejected the student's claim with the observation that the "exercises are merely a social occasion on which students and their families and friends gather to mark an event." *Id.* at 94.

accord editorial privileges over the ceremony to any person desiring to attend it.⁴⁰

3. The Religious Beliefs Of Those Who Attended The Ceremony Were Not Coerced

Quite apart from the voluntary nature of attendance at public school graduation ceremonies in Providence, it is clear that those who attended Nathan Bishop Middle School's graduation ceremony in 1989 were in no way coerced to accept or support the religious beliefs expressed by Rabbi Gutterman. "No one was compelled to . . . participate in any religious ceremony or activity." *County of Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring in the judgment in part and dissenting in part). Unlike *Abington School Dist.*, in which the students were asked to stand and recite a prayer in unison, no one was required to join in, agree with, or even listen to Rabbi Gutterman's invocation and benediction.

That students and other children are in attendance at graduation ceremonies does not alter this analysis. Children also attend presidential inauguration ceremonies, legislative and court sessions, and countless other civic ceremonies and events in which religious values are expressed. That fact,

⁴⁰ In addition, as the *Albright* court pointed out, though respondent and his daughter can speak of their desire to attend graduation without any invocation or benediction, the "same can be said in reverse as to graduating seniors who want such prayer." Slip op. at 9. One commentator elaborated:

A student raised in a religious tradition who is taught the importance of prayer, who is exposed to public prayer at weddings, funerals, major governmental functions, and other significant transitional moments of life, may well be as firmly convinced that prayer at graduation, one of the most significant events in his or her life to date, is as essential as the non-believing student thinks it is not. Such a student may find a graduation without prayer incomplete, unfulfilling or downright offensive. The "believing" students' choice of foregoing graduation or "participating in a ceremony with which they have fundamental disagreement" is no less "odious" than that of the "unbelieving" student.

DuPuy, *supra* n.6, at 353.

standing alone, does not render all religious speech at such occasions coercive. Nor can graduation ceremonies be aptly analogized to the potentially coercive classroom context. The Sixth Circuit in *Stein* elaborated on the distinctions between graduation ceremonies and classroom instruction:

Although children are obviously attending the ceremony, the public nature of the proceeding and the usual presence of parents acts as a buffer against religious coercion. In addition, the graduation context does not implicate the special nature of the teacher-student relationship – a relationship that focuses on the transmission of knowledge and values by an authority figure.

822 F.2d at 1409.⁴¹

To the *Stein* court's points we should add that graduation invocations and benedictions are but brief segments of a much longer, otherwise entirely secular, ceremony. In addition, school authorities do not themselves deliver these ceremonial acknowledgments of religion. They merely invite a private citizen to offer the invocation, authored by the speaker himself, just as they invite other speakers with different secular views to address the audience during the ceremony. Furthermore, though graduation exercises may be held on the premises of a school, J.A. 12-18; App. 19a, they are not part of the pedagogical activities of the school.

Underscoring the lack of coercive influences in the graduation ceremony setting is this Court's acknowledgment in *Mergens* that secondary school students understand "that schools do not endorse everything they fail to censor." 110

⁴¹ See also *Jones*, slip op. at 13 (Graduation is "an assembly where many parents are present rather than a classroom setting, where the prospect of subtle official and peer coercion warrants stricter separation of the state from things religious."); *Grossberg*, 380 F.Supp. at 288 (In graduation exercises, "[t]here is none of the repetitive or pedagogical function of the exercises which characterized the school prayer cases."); *Wood*, 342 F.Supp. at 1294 ("[G]raduation ceremonies . . . are ceremonial and are in fact not a part of the formal, day-to-day routine of the school curriculum to which is attached compulsory attendance."); *Wiest*, 320 A.2d at 367 (Roberts, J., concurring) (noting "the public and ceremonial nature of the occasion and the presence of students and adults of all persuasions").

S.Ct. at 2372. See also *Jones*, slip op. at 12 ("The graduation ceremony lies on the threshold of high school students' transitions into adulthood, when religious sensibilities hardly constitute impressionable blank slates."); *Albright*, slip op. at 21 ("[H]igh school students are not 'babes in arms' and . . . are mature enough to understand that a school does not endorse or promote a religion by permitting prayer. . . .").

Just as attendees at Nathan Bishop Middle School's 1989 graduation need not accept or support the religious beliefs expressed in Rabbi Gutterman's invocation and benediction, so also

[t]he holder of a nickel need not trust in God, no matter what the coin says, and need not contribute the nickel (or even three pence) to a church. He may labor on Christmas if he likes – though Ebenezer Scrooge had to give Bob Cratchit that day off without governmental compulsion. He may "affirm" rather than "swear" when giving testimony and be silent while others say the Pledge of Allegiance. . . . He need not study or even own a Bible during the "Year of the Bible." And he may turn his back on the creche.

American Jewish Congress, 827 F.2d at 133 (Easterbrook, J., dissenting). If Rabbi Gutterman's prayers are held to coerce religious conformity among members of his audience, and thus to be unconstitutional, a staggering variety of traditional and venerable acknowledgments of religion must be extirpated from our public life. It must follow, for example, that this Court's Crier coerces religious conformity when he opens oral argument sessions. There is no principled distinction.

In sum, the religious speech challenged here is devoid of any element of government coercion that could interfere with the religious liberty of the audience. Accordingly, petitioners have committed no offense against "the great object" of the Religion Clauses: the "freedom to worship as one pleases without government interference or oppression." *County of*

Allegheny, 492 U.S. at 660 (Kennedy, J., concurring in the judgment in part and dissenting in part).⁴²

II. *Lemon v. Kurtzman* Does Not Require Invalidation Of The Venerable Tradition Of Graduation Invocations And Benedictions

The courts below held that the graduation invocations and benedictions at issue here had the principal effect of advancing religion – the second prong of the *Lemon* analysis – and so violated the Establishment Clause. App. 23a. As a result, they did not address the other two components of *Lemon*.⁴³

⁴² Since inclusion of a traditional, brief invocation and benediction in commencement exercises does not effect an unconstitutional coercion of religious choice, exclusion of speech because of its religious content would seem to violate the free speech and free exercise rights of the speaker and his audience. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). Similarly, depriving students who are religious of this kind of expression at their graduation solely because it is religious signals a government disapproval of religion that is also contrary to the Establishment Clause. See *County of Allegheny*, 492 U.S. at 660 (O'Connor, J., concurring in part and concurring in the judgment). Accordingly, it is well to recall here Justice Brennan's admonition: "Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause . . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment).

⁴³ The graduation prayers in this case pass muster under the other two elements of the *Lemon* test. First, these prayers have "the secular purpose of solemnizing the occasion." *Albright*, slip op. at 17. See also *Jones*, slip op. at 8 (Graduation "invocations addressing a deity" are "as consistent with the secular solemnizing purpose as any religious purpose."); *Stein*, 822 F.2d at 1409 ("The invocation and benediction at a graduation ceremony serves the 'solemnizing' function. . . ."). In addition, they serve the legitimate and important purpose of providing "recognition and acknowledgment of the role of religion in the lives of our citizens." *County of Allegheny*, 492 U.S. at 623 (O'Connor, J., concurring in part and concurring in the judgment). Second, no government action threatens excessive entanglement with religion. Neither the Providence School Committee

(Continued on following page)

The holding below rested on the conclusion that "[t]he special occasion of graduation coupled with the presence of prayer creates an identification of governmental power with religious practice." App. 25a. As we have candidly admitted above, we cannot in good conscience urge that this application of *Lemon* was wholly unfaithful to that precedent. Yet examination of the subsequent development of *Lemon* – notably this Court's warnings concerning its limits – suggests that a more accurate vision of the Establishment Clause as seen through the lens of *Lemon* would approve of the kind of graduation prayers at issue in this case.

The courts below were certainly correct that one iteration of the "effects" prong of *Lemon* focuses on whether a governmental practice appears to endorse or sponsor religion through "a close identification" of government power with religious activities. *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 389 (1985). Yet they then went on to apply the *Grand Rapids* "close identification" notion untempered by this Court's Establishment Clause teaching in other major precedents. Thus the courts below were able to follow a rather simple recipe for their judgment in this case. As the district court put it, "It is the union of prayer, school, and important occasion that creates an identification of religion with the

(Continued from previous page)

nor the Superintendent requires prayer to be included in graduation ceremonies in the school district. J.A. 18. Though guidelines for such prayer are distributed to the schools, those guidelines are not formulated by government officials, the prayers are prepared by outside clergy, and no government review or monitoring of the prayers is involved. See *Jones*, slip op. at 15 (noting that even review by school officials of invocations for sectarianism and proselytization does not constitute excessive entanglement). Far from being the kind of "comprehensive, discriminating, and continuing state surveillance" prohibited by *Lemon*, 403 U.S. at 619, the guidelines distributed here are akin to the guidelines for public schools' Christmas assemblies upheld in *Florey v. Sioux Falls School Dist.* 49-5, 619 F.2d 1311 (8th Cir.), cert. denied, 449 U.S. 987 (1980), which the court concluded served to avoid, rather than create, excessive entanglement with religion. *Id.* at 1318. Moreover, ongoing government surveillance of graduation speakers to censor any reference to the deity necessarily involves an equal or greater degree of religious entanglement.

school function." App. 24a. In other words, add religious expression to an important civic event and you have a violation of the Establishment Clause.

In contrast, this Court has never embraced such an absolute analysis. *Lemon* itself did "not call for total separation between church and state." 403 U.S. at 614. *See also Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973) ("It has never been thought either possible or desirable to enforce a regime of total separation . . ."); *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring in the judgment) (noting that "[c]haos would ensue" if every statute that promotes a secular goal but also has "a primary effect of helping or hindering a sectarian belief" were invalidated under the Establishment Clause). To the contrary, the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). As a result, this Court has warned that "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Id.* at 680.

This is the warning ignored, and the error made, by the courts below. The district court forthrightly observed that, in its view, "the Establishment Clause would not be implicated" by the "exact same invocation" if "God would be left out." App. 28a. To underscore this point, the court then recast Rabbi Gutterman's invocation into a court-approved version, deleting only references to God. App. 28a n.10.

With such narrow reasoning, the courts below failed to employ the broader analysis mandated by this Court for application of the *Lemon* standards. "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring). It is true that God could be "left out" of the invocation and benediction at issue here. So too could God be left out of the invocation that has traditionally opened this Court's sessions. But the availability of a more secular alternative has never been deemed relevant to the Establishment Clause inquiry. *Lynch*, 465 U.S. at 681 n.7. *See also County of Allegheny*, 492

U.S. at 636 (O'Connor, J., concurring in part and concurring in the judgment) (observing that a "more secular alternative" test "is too blunt an instrument for Establishment Clause analysis, which depends on sensitivity to the context and circumstances presented by each case").

Examination of the circumstances of the graduation prayer here does not support the conclusion that such ceremonies produce a "close identification" of government with religion. Including such invocations and benedictions in commencement ceremonies vastly predates the existence of American public schools, and a format for such proceedings was well established by the time government entered education.⁴⁴ Clearly, communal traditions, not government action, have been the impetus for including such elements in graduation ceremonies.

In Providence, the School Committee and Superintendent have left the decision to each school whether to include an invocation and benediction in graduation exercises, with the result that some ceremonies have included such prayers, while others have not. J.A. 4, 12-16, 18, 24; App. 19a. No government official prepares or delivers these prayers, though guidelines for prayer at public civic ceremonies from the National Conference of Christians and Jews are provided to the clergy invited to deliver them. J.A. 12-15; App. 19a. In addition to this passive government role, graduation or promotion ceremonies obviously occur only once in a student's career at a school, and an invocation or benediction is merely a brief part of each ceremony.⁴⁵ Moreover, the ceremonies are removed from the usual pedagogical setting of the classroom, where attendance is compulsory and authoritative instruction is the normal order of the day. Graduation ceremonies take place rather in a voluntary assembly in which family and friends

⁴⁴ K. Sheard, *supra* n.7, at 71; DuPuy, *supra* n.6, at 358.

⁴⁵ *See Jones*, slip op. at 13 (noting the brief duration of commencement prayers as part of the Fifth Circuit's conclusion that they do not constitute government endorsement of religion); *Grossberg v. Deusebio*, 380 F.Supp. 285, 289 (E.D. Va. 1974) ("The event, in short, is so fleeting that no significant transfer of government prestige can be anticipated.").

may accompany the student in this traditional coming-of-age celebration.

This context bears little similarity to those situations in which this Court has invalidated government action under *Lemon* for conferring an "imprimatur of state approval on religious sects or practices." *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). See, e.g., *Grand Rapids School Dist.*, 473 U.S. 389-392 (1985) ("symbolic union" between church and state where students move back and forth between religious and "public school" classes in the same private school building, and public school teachers may appear to be "regular adjunct[s]" to the religious school); *Abington School Dist.*, (Bible readings part of prescribed curriculum; conducted under supervision of teachers; children may be excused from classroom during reading); *Engel* (state-drafted school prayer); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948) ("release time" program for religious instruction on public school grounds; nonparticipating students kept at school for secular work.).

The extremely limited role of religion in graduation exercise in the form of this invocation and benediction does not constitute a government endorsement of religion as understood in this Court's cases. Neither the texts of the invocation and benediction – in the district court's words, "examples of elegant simplicity, thoughtful content, and sincere citizenship" App. 20a – nor the circumstances of their delivery should they be construed as "making adherence to a religion relevant in any way to a person's standing in the political community." *County of Allegheny*, 492 U.S. at 594, quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring). The courts below found government endorsement here simply by virtue of the school's failure to censor references to the deity, as its revision of the invocation so unmistakably demonstrates. Such a notion cannot be squared with this Court's contrary view that "schools do not endorse everything they fail to censor." *Mergens*, 110 S.Ct. at 2372.

In sum, in our constitutional order, such acknowledgements of religion achieve the completely legitimate ends of "solemnizing public occasions, expressing confidence in the

future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring). *Lemon* should not be read, as did the courts below, to prevent Americans from choosing, as they have for two centuries, to use religious expression in such a role.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

ROBERT E. LEE, *et al.*,

Petitioners,

-v.-

DANIEL WEISMAN, *etc.*,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

Respondent Daniel Weisman, whose daughter Deborah attends a public school in the City of Providence, Rhode Island, initiated this action in June 1989, in order to prevent the inclusion of prayer in Deborah's eighth grade promotional ceremony from the Nathan Bishop Middle School. The district court allowed the ceremony to proceed as scheduled.¹ The parties then

¹ Daniel Weisman filed his initial complaint four days before the
(continued...)

submitted the case to the district court upon an Agreed Statement of Facts, which is summarized below.

At the close of each school year, the Members of the Providence School Committee and the Superintendent of Schools sponsor a promotional ceremony in each of the City's public middle schools and a graduation ceremony in each of the City's public high schools. (J.A.12, ¶11).² Eighth grade promotional ceremonies for the public middle schools are routinely conducted on school premises; high school graduation ceremonies are generally conducted in auditoriums which petitioners rent for the occasion. (J.A.13-16, ¶¶19-29; J.A.17, ¶34). Petitioners supervise and authorize the content of the public school promotional and graduation ceremonies. (J.A.12, ¶12). Their practice has been to allow the principal of each middle school and each high school to include, in the school's ceremony, an invocation and benediction in the form of prayer, delivered by clergy who are selected by school department employees. (J.A.12, ¶13; J.A.18, ¶40).

In June 1989, when respondent initiated this action, his daughter Deborah was an eighth grade student in the Nathan Bishop Middle School, a public school in the City of Providence. (J.A.10, ¶3). Teachers at the Nathan Bishop Middle School had planned a promotional ceremony for eighth grade students and had suggested

¹ (...continued)

Nathan Bishop Middle School's promotional ceremony was scheduled to be held. The district court judge denied his Motion for a Temporary Restraining Order on the ground that the court did not have sufficient time, prior to the scheduled ceremony, to adequately address the issues presented. Deborah Weisman now attends Classical High School, a public high school in the City of Providence whose graduation ceremonies generally include prayer. (J.A.10, ¶3; J.A.13-14, ¶20).

² References to the joint appendix are preceded by the letters "J.A." The decisions below, which were included in the appendix to the petition for *certiorari*, are cited at "App.A" or "App.B."

to the principal, petitioner Robert E. Lee, that Rabbi Leslie Gutterman be asked to deliver an invocation and benediction at the ceremony. (J.A.12-13, ¶16). Petitioner Lee conveyed the invitation to Rabbi Gutterman, who accepted. (J.A.17, ¶36).

Prior to the actual ceremony, petitioner Lee provided to Rabbi Gutterman a pamphlet entitled "Guidelines for Civic Occasions," published by the National Conference of Christians and Jews. (J.A.13, ¶17). This pamphlet specifies the type of "public prayer" which should be composed for civic occasions. (J.A.20-21). Petitioners had distributed this pamphlet to all of the principals of Providence's middle schools and high schools as a guideline for the type of prayer to be included in the promotional and graduation ceremonies conducted in Providence's public schools. (J.A.12, ¶¶14-15). Petitioner Lee also instructed Rabbi Gutterman personally that the prayers he delivered at Nathan Bishop's promotional ceremony should be nonsectarian. (J.A.13, ¶17).

The parties agree that the invocation and benediction delivered by Rabbi Gutterman are prayers. (J.A.17, ¶36). For his invocation, Rabbi Gutterman prayed, as follows:

God of the Free, Hope of the Brave:

For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all can seek justice we

thank You. May those we honor this morning always turn to it in trust.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN

(J.A.22). For his benediction, Rabbi Gutterman offered the following prayer:

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

AMEN

(J.A.23).

From 1985 through 1989, many, but not all, graduation ceremonies conducted by the City of Providence's

public high schools included invocations and benedictions in the form of prayer, delivered by clergy.³ (J.A.13, ¶18). In each case in which prayers were included, the respective high school produced and distributed a program that identified the name and institutional affiliation of the clergy who delivered the prayers. (J.A.13-14, ¶¶19-22). During the same time period, Providence's six public middle schools conducted annual promotional ceremonies for eighth grade students. All of these ceremonies took place on the premises of the respective school. (J.A.15-16, ¶¶23-29). Two of the six public middle schools included invocations and benedictions in the form of prayer in their ceremonies; the remaining four schools did not include prayer in their promotional ceremonies. Like the high schools, each middle school produced programs that identified the clergy delivering the invocation and benediction. (J.A.15, ¶¶23-24). Parents and friends of students are invited to attend Providence public schools' promotional and/or graduation ceremonies. (J.A.18, ¶42). Attendance at the ceremony is not mandatory for students. (J.A.18, ¶41).

In holding that the practice of including prayer in public school graduation and promotional ceremonies violates the Establishment Clause of the United States Constitution, the district court noted:

"The [Supreme] Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aquillard* [sic], 482 U.S. 578, 583-84 (1987)

This vigilance is based upon the perceived sensitive nature of the school environment

³ Of five public high schools located in the City of Providence, only one high school never included prayer in its graduation ceremonies during the five year period reviewed in the record. (J.A.16, ¶29).

and the apprehended effect of State-led religious activity on young, impressionable minds.

App.B at 21a-22a (citation omitted).

Relying on established precedent, the district court analyzed the facts before it under the three-pronged test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Specifically, the district court held that "the benediction and invocation advance religion by creating an identification of school with a deity, and therefore religion." App. B at 24a (footnote omitted). This prohibited effect was heightened, according to the district court, by the fact that the challenged prayers were offered at graduation ceremonies. "It is the union of prayer, school, and important occasion that creates an identification of religion with a school function. The special nature of the graduation ceremonies underscores the identification that Providence public school students can make." App. B at 24a. The court then evaluated whether or not the identification of school with religion conveyed a message endorsing a particular religion or religion in general. After reviewing the facts in the record, the court concluded that petitioners' practice did convey such a message. App.B at 25a.⁴

Petitioners argued before the district court that the constitutionality of their policy concerning prayer at middle school promotional ceremonies and at high school graduation ceremonies should be analyzed under *Marsh v. Chambers*, 463 U.S. 783 (1983). The court rejected *Marsh* as inapplicable to prayer in a public school setting. App.B at 27a. Furthermore, the district court held "[e]xtending the *Marsh* analysis to school benedictions is

⁴ Because the court found that the challenged practice has the effect of advancing and endorsing religion, its analysis does not address issues of purpose and entanglement. App.B at 23a.

arguably unworkable because it results in courts reviewing the content of prayers to judicially approve what are acceptable invocations to a deity What must follow is a gradual judicial development of what is acceptable public prayer." *Id.* (citations omitted).

The United States Court of Appeals for the First Circuit affirmed the district court's decision, with Judge Campbell dissenting. App.A at 1a-17a. The majority opinion simply adopted the reasoning of the lower court; however, Judge Bownes' concurring opinion elaborated on the purpose and entanglement prongs of the *Lemon* test, which were not addressed by the district court. App.A at 2a, 9a-11a. Judge Bownes found that the primary purpose of prayer at a graduation ceremony is religious and that "a prayer given by a religious person chosen by public school teachers communicates a message of government endorsement of religion." App.A at 9a-10a. Judge Bownes also found that the specific facts of this case raise entanglement concerns for two reasons. First, school teachers choose speakers among various religious groups. Second, school officials engage in the supervision and regulation of the content of the prayers offered by clergy. App.A at 10a.

Judge Campbell's dissenting opinion tacitly concedes that petitioners' practice is unconstitutional under existing precedent. Consequently, he is forced to articulate a new rule that would provide for the allowance of invocations and benedictions at ceremonial occasions, provided that speakers are rotated among "representatives of the Judeo-Christian religion[] . . . representatives of other religions and of nonreligious ethical philosophies" App.A at 16a. As Judge Campbell himself recognizes, however, "[i]t may be . . . that even more needs to be done, to insure not only that the state does not identify itself with a particular religion but with religion generally." *Id.*

SUMMARY OF ARGUMENT

The issue in this case is whether public school officials violate the Establishment Clause when they include prayer as an integral part of promotional or graduation ceremonies, choose the clergy who appear at each ceremony, and monitor the content of prayers that are delivered to the assembled students. The court below found that such practices cannot be sustained under any interpretation of the Establishment Clause ever adopted by this Court. That decision is correct and should be affirmed.

Petitioners do not seriously quarrel with the decision below. Instead, they have seized upon this case as a vehicle to ask the Court to overturn more than four decades of well-settled law and rule, for the first time, that there can be no "establishment" of religion in the absence of coercion. It is an old and discredited argument that has been rejected by this Court on numerous occasions including, most recently, only two years ago. See *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). If it is even reached in this case (since it was not raised below), it can and should be rejected again.

Because petitioners' attack is focused more on this Court's Establishment Clause jurisprudence than the decision below, their brief continuously refers to practices that are not at issue in this case, such as Thanksgiving Day proclamations. In so doing, petitioners distort the issues before this Court and ignore the Court's historic awareness of "the sensitive relationship between government and religion and the education of our children." *Grand Rapids School District v. Ball*, 473 U.S. 373, 383 (1985).

By focusing exclusively on the *Lemon* test, petitioners also ignore this Court's explicit recognition that *Lemon* did not create a new test but merely distilled the principles articulated in previous decisions. Before and

after *Lemon*, this Court has consistently stressed that the Establishment Clause requires government neutrality toward religion in order to preserve the integrity of both. See, e.g., *Abington v. Schempp*, 374 U.S. 203, 226 (1963). It is that principle, not just *Lemon*, that petitioners have violated.

This is not a case where the religious significance of the challenged practice is questionable or marginal. Petitioners have stipulated that this is a case about prayer, and this Court has consistently described prayer as an inherently religious activity. By incorporating prayer into a major public school ceremony, petitioners have violated every prong of the *Lemon* test. The unavoidable message delivered to the school children is that school officials support and encourage participation in a religious exercise. Efforts to dilute that message by reviewing the prayer before it is delivered only entangle school officials with religious practices that should remain the domain of the clergy.

Citing *Marsh v. Chambers*, 463 U.S. 783, petitioners contend that the use of prayer at public school promotional and graduation ceremonies is consistent with other historical practices of the framers and, therefore, must be consistent with the Establishment Clause. Confronted with similar arguments in the past, this Court has noted that "a historical approach is not useful in determining the proper roles of church and state in public schools" *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987). Moreover, *Marsh* itself carefully distinguished between religious practices aimed at adults and those directed at children who are more susceptible to "religious indoctrination." 463 U.S. at 792.

Petitioners' use of history to support their proposed coercion test is equally flawed. It is true that the founding generation opposed the coercion of religious beliefs. However, it is also true that the founding generation opposed the noncoercive endorsement of religion, and re-

pealed a variety of provisions providing for such endorsement during the very years that the Constitution was being debated and adopted. Respecting that history, this Court has squarely and repeatedly rejected any claim that coercion is a necessary element of the Establishment Clause. See, e.g., *Engel v. Vitale*, 370 U.S. 421, 431 (1962); *Abington v. Schempp*, 374 U.S. at 224-25; *Committee for Public Education v. Nyquist*, 413 U.S. 756, 786 (1973).

Finally, petitioners' definition of coercion disregards the subtle pressures that the Court has always recognized as coercive, especially in the school setting. Indeed, no member of this Court has ever adopted the limited definition of coercion that petitioners now embrace. The pressure upon public school children to conform to their classmates' behavior and their teachers' expectations and instructions does not vanish when the classroom door closes and the graduation march begins. Petitioners' unwillingness to recognize that fact highlights the unsuitability of their proposed coercion test.

ARGUMENT

I. PETITIONERS' PRACTICE OF INVITING CLERGY TO OFFER PRAYERS AT THE PROMOTIONAL AND GRADUATION CEREMONIES HELD BY PUBLIC MIDDLE SCHOOLS AND HIGH SCHOOLS VIOLATES THE ESTABLISHMENT CLAUSE UNDER ANY CRITERIA EVER ADOPTED BY THIS COURT

A. Any Analysis Of The Constitutionality Of Petitioners' Practice Of Including Prayer In Public School Promotional And Graduation Ceremonies Must Begin With Recognition Of The Special Nature Of The Public School Setting

Petitioners' global analogies which liken prayer in public school promotional and graduation ceremonies to prayer during presidential inaugurations, congressional sessions, and proclamations of National Days of Thanksgiving, are a thinly disguised attempt to escape the essential nature of this case. Unlike petitioners' analogies, this case is about the constitutionality of prayer in a public school setting. That distinction is crucial, moreover. This Court has consistently recognized that the introduction of religion into the public schools raises special and severe problems under the Establishment Clause. Thus, while acknowledging the value of prayer "based on our spiritual heritage," *Engel v. Vitale*, 370 U.S. at 425 (citation omitted), and posting of the Ten Commandments "as the fundamental legal code of Western Civilization and the Common Law of the United States," *Stone v. Graham*, 449 U.S. 39, 41 (1980) (citations omitted), this Court has never hesitated to strike down such practices when undertaken as part of public education.

Because of this Court's enhanced sensitivity towards Establishment Clause violations within the public

schools, a constitutional analysis of prayer at public school functions is intrinsically distinct and segregable from considerations applicable to other public arenas. Justice Frankfurter eloquently traced the roots of this special concern in a concurring opinion in *Ill. ex rel. McCollum v. Board of Education*, 333 U.S. 203, 212 (1948), in which he took note of the fierce struggles for state support among conflicting denominations that led to a burgeoning public school system, removed from the divisiveness of competing religious groups:

Zealous watchfulness against fusion of secular and religious activities by Government itself, through any of its instruments but especially through its educational agencies, was the democratic response of the American community to the particular needs of a young and growing nation, unique in the composition of its people The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects.

Id. at 215-17 (footnote omitted).

The importance of maintaining strict neutrality toward religion within the public education system is a thread that weaves together all modern Establishment Clause decisions of this Court addressing the juxtaposition of religion and public schools. Since this Court first

began to grapple with the meaning and intent of the Establishment Clause, it has decreed both advocacy for religion and hostility towards religion out of bounds within this nation's public schools. In his lengthy concurrence in *Abington v. Schempp*, 374 U.S. 203, Justice Brennan summarized the Court's views on religion in the public schools:

[T]he American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve. The interaction of these two important forces in our national life has placed in bold relief certain positive values in the consistent application to public institutions generally, and public schools particularly, of the constitutional decree against official involvements of religion which might produce the evils the Framers meant the Establishment Clause to forestall It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort -- an atmosphere in which children may assimilate a heritage common to all American groups and religions [T]his is a heritage neither theistic nor atheistic, but simply civic and patriotic.

Id. at 241-42 (citations omitted)(emphasis in original).

Like Justice Frankfurter, Justice Brennan recognized the unique role filled by public education in a country that, over time, has become extraordinarily diverse in the

religious beliefs of its citizens.⁵ In *Epperson v. Arkansas*, 393 U.S. 97, 104-05 (1968), the Court reaffirmed its special concern for religious practices in the public schools, citing with approval *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)("[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools"), and *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)("[T]he First Amendment 'does not tolerate laws that cast a pall of orthodoxy over the classroom'").

Recent decisions of this Court continue to recognize the special role of the public education system in our society, coupled with the understanding that public school children are more susceptible than adults to religious messages. Rejecting a comparison between presidential proclamations celebrating Thanksgiving and a period of silence for the purpose of prayer in the public schools, Justice O'Connor has observed:

At the very least, Presidential Proclamations are distinguishable from school prayer in that they are received in a non-coercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination. This Court's decisions have recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs.

Wallace v. Jaffree, 472 U.S. 38, 81 (1985)(O'Connor, J., concurring)(citations omitted). See also *Grand Rapids*

⁵ In *Edwards v. Aguillard*, 482 U.S. at 607 n.6, Justice Powell in his concurrence noted that "The Encyclopedia of American Religions (2d ed. 1987) describes 1,347 religious organizations."

School District v. Ball, 473 U.S. at 383 ("We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children. The government's activities in this area can have a magnified impact on impressionable young minds"); *Edwards v. Aguillard*, 482 U.S. at 583-84 ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure")(footnote omitted)(citation omitted).⁶

Petitioners choose to ignore the consistent recognition by this Court, spanning more than forty years, that the public education system in this country fills a unique and vital role in the lives of our children and in the con-

⁶ This Court reaffirmed, just one year ago, its deep concern with the intermingling of public school officials, religion, and school children. *Board of Education v. Mergens*, ___ U.S. ___, 110 S.Ct. 2356 (1990). Applying the *Lemon* test to an Establishment Clause challenge to the Equal Access Act, the *Mergens* Court carefully reviewed the limitations imposed by the Act on any involvement of school officials in voluntary, student-organized and student-led groups. Because the Act on its face prohibited the school from sponsoring religious groups or their meetings, limited school official involvement to custodial, "non-participatory" attendance, and forbade any state influence of any religious activity, the Court's plurality held that the purpose of the Act was to "prevent discrimination against religious and other types of speech," and that no message of school endorsement was conveyed by the mere allowance of a wide variety of student-initiated and student-led clubs. *Id.* at 2370-73. The basic thesis underlying the Court's analysis in *Mergens* was the creation of a limited public forum for student groups. The facts in this case are not remotely comparable -- here, public school teachers chose a member of the clergy to deliver prayers at an event run by and organized by public school officials. Those same officials directed the clergy they chose regarding the content of the prayers he or she was to deliver.

tinued vitality of constitutional principles upon which this country is founded. This case is not about presidential proclamations, inaugural ceremonies, or the opening of legislative or judicial sessions. Rather, this case is about prayer in a public school sponsored event, delivered by a member of the clergy chosen by a public school official, and both planned and supervised by school officials as the culmination of a child's progress through the public school system. To suggest that the special vigilance which this Court has long accorded in evaluating religious practices within the public schools is inapplicable here is to blink at reality. Promotional and graduation ceremonies are as integral to a child's school career as is daily class attendance.⁷ Any analysis of a school policy pertaining to these ceremonies which implicates Establishment Clause concerns must begin with the heightened vigilance accorded to religious practices in the public schools.

B. The *Lemon* Test Reflects The Concept That The Establishment Clause Mandates Neutrality And Autonomy Between Public Schools And Religion

For the past twenty years, this Court and the lower courts have consistently relied on the so-called *Lemon* test in evaluating Establishment Clause claims. As Justice Powell has observed, *Lemon* "identifies standards that have proved useful in analyzing case after case both in our decisions and in those of other courts. It is the only coherent test a majority of the Court has ever adopted." *Wallace v. Jaffree*, 472 U.S. at 63 (Powell, J., concurring).

Petitioners' singleminded focus on *Lemon*, however,

⁷ Indeed, as the district court aptly observed, "The special nature of the graduation ceremonies underscores the identification that Providence public school students can make." App.B at 24a.

disregards the fact that *Lemon* itself is merely a distillation of this Court's other Establishment Clause holdings. Indeed, *Lemon*'s formulation of secular purpose and effect flows directly from *Schempp*'s explanation of "wholesome neutrality." 374 U.S. at 222. Thus, in asking the Court to reconsider *Lemon*, petitioners are effectively asking the Court to reconsider its entire Establishment Clause jurisprudence covering nearly half a century. See, e.g., *Everson v. Board of Education*, 330 U.S. 1, 18 (1947) ("[The First] Amendment requires the State to be a neutral in its relations with groups of religious believers and non-believers"); *Zorach v. Clausen*, 343 U.S. 306, 314 (1952) ("The government must be neutral when it comes to competition between sects"); *Abington v. Schempp*, 374 U.S. at 226 ("In the relationship between man and religion, the State is firmly committed to a position of neutrality"); *Epperson v. Arkansas*, 393 U.S. at 103-104 ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice"); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 741 (1976) ("Neutrality is what is required"); *Wallace v. Jaffree*, 472 U.S. at 60 ("[G]overnment must pursue a course of complete neutrality toward religion").

To discard the concepts embodied in *Lemon* and expounded upon in numerous decisions by this Court is to invite havoc in both the lower courts and in the administration of the public schools. To discard *Lemon* is to discard the rationale of *Schempp*, and all of this Court's decisions that teach that prayer cannot be incorporated into the public schools. To discard *Lemon* is to solicit renewed litigation of all of the practices which this Court has already determined impermissibly mix religion and public education.⁸

⁸ Indeed, the National School Boards Association ("NSBA") has filed a
(continued...)

The basic concepts enunciated in the *Lemon* test were not newly devised in *Lemon*, but developed gradually, founded on the premise that the Establishment Clause requires government to maintain neutrality towards competing religious sects and towards religion generally. "The government is neutral, and, while protecting all, it prefers none, and it *discharges* none." *Abington v. Schempp*, 374 U.S. at 215 (emphasis in original), citing with approval *Minor v. Board of Education in Cincinnati* (Super.Ct. Cincinnati, Ohio, 1870)(Taft, J., dissenting). Government, in short, is prohibited both from inhibiting the free exercise of religion and from allowing "a majority" to use "the machinery of the State to practice its beliefs." *Abington v. Schempp*, 374 U.S. at 226.

In discussing the genesis of the Establishment Clause, this Court observed in 1947, long before *Lemon*, that,

[t]he people [in Virginia], as elsewhere, reached the conviction that individual religious liberty could be achieved best under a

⁸ (...continued)

brief *amicus curiae* in this case which, although nominally in support of petitioners, is actually an argument in support of the continued "viability of the *Lemon* test." NSBA Brief at 3. The Association's brief takes no position on the merits of this case; however, it vividly describes the chaos which would result were the Court to discard *Lemon*:

However difficult the *Lemon* test may sometimes be to apply, it has been the test for 20 years and school people, students and parents have relied on it. If the Court in this case develops a "new test," assuredly that action will send out a message to schools, students, parents and communities throughout this country that all of the religion in the schools' cases are no longer "good law" or at least are questionable.

NSBA Brief at 20.

government which was stripped of all power to tax, to support, or *otherwise to assist* any or all religions

Everson v. Board of Education, 330 U.S. at 11 (emphasis added). The Court employed similar language in holding, during the following year, that religious instruction within the public schools, taught by private religious groups, violates the Establishment Clause:

This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment

Ill. ex rel. McCollum v. Board of Education, 333 U.S. at 210.

The next Establishment Clause case decided by this Court and related to practices within the public schools was *Zorach v. Clausen*, 343 U.S. 306. While the Court in *Zorach* did not refer to government actions "supporting," "aiding" or "assisting" religion, it employed other terms equally familiar in modern Establishment Clause jurisprudence. Thus, the Court held, the First Amendment "studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other [i.e. church on state, or vice versa]." *Id.* at 312. In particular, "[g]overnment may not finance religious groups nor undertake religious instruction *nor blend secular and sectarian education*" *Id.* at 314 (emphasis added).

Three decades ago, in *McGowan v. Maryland*, 366 U.S. 420, 449 (1961), the Court employed the terms "purpose and effect" in its analysis of the constitutionality of Sunday closing laws:

After engaging in the close scrutiny demanded of us when First Amendment liberties

are at issue, we accept the State Supreme Court's determination that the statute's present purpose and effect is not to aid religion but to set aside a day of rest and recreation.

These terms began to be referred to as the Establishment Clause "test" several years later, when the Court considered the constitutionality of daily recitation of the Bible and Lord's Prayer in public school classrooms:

The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Abington v. Schempp, 374 U.S. at 222 (citations omitted), cited with approval in *Epperson v. Arkansas*, 393 U.S. at 107.

In *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), this Court began to further develop the concepts of "purpose" and "effect" as they pertain to Establishment Clause issues:

Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result -- the effect -- is not an excessive government entanglement with religion.

Id. at 674.

The Court relied on its analysis in *Schempp* and

Walz when it devised the now familiar *Lemon* test:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

Lemon v. Kurtzman, 403 U.S. at 612-13 (citations omitted).

In sum, *Lemon* simply coalesced concepts which the Court had been applying in Establishment Clause cases for over twenty years. Indeed, the Court itself has recognized this to be true:

[T]hese tests or criteria should be "viewed as guidelines" within which to consider "the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause."

Committee for Public Education v. Nyquist, 413 U.S. at 773 n.31, quoting *Tilton v. Richardson*, 403 U.S. 672, 677-78 (1971). See also *Meek v. Pittenger*, 421 U.S. 349, 358 (1975) ("These tests constitute a convenient, accurate distillation of this Court's efforts over the past decades . . ."). Since *Lemon*, its familiar three-prong test has been accepted by this Court as a logical and comprehensible starting point for constitutional analysis in Establishment Clause cases.⁹

⁹ The one exception, of course, is this Court's decision in *Marsh v. Chambers*, 463 U.S. at 791, in which the Court adopted a historical analysis, centered upon the "unique history" of legislative chaplains. The *Marsh* Court was squarely presented with a practice identical to one authorized and adopted by the Congress which drafted the First Amendment. The *Marsh* rationale, however, does not "fit" the facts (continued...)

While consistently reaffirming the *Lemon* framework as a viable means of analyzing Establishment Clause issues, this Court recently clarified and refined its meaning and substance. In her concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984), Justice O'Connor restated the heart of the *Lemon* test:

The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

The "purpose" and "effect" prongs of the *Lemon* test are thus addressed by an evaluation of both the objective and subjective "components of the message" conveyed by the challenged government action. A secular purpose which is a mere sham is not enough to save a challenged practice from constitutional infirmity. See *Stone v. Graham*, 449 U.S. 39. Rather, it is the actual intent of the government which is critical under the "purpose"

⁹ (...continued)

before the Court here. As the Court has previously noted in *Edwards v. Aguillard*, 482 U.S. at 583 n.4, such an approach "is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted" (citations omitted). See also *Wallace v. Jaffree*, 472 U.S. at 80 (O'Connor, J., concurring)(noting that since free public education was "virtually nonexistent" when the framers adopted the First Amendment "it is unlikely that [they] anticipated the problems of interaction of church and state in the public schools"). Indeed, the natural evolution of our culture, together with astounding technological progress, guarantee that innumerable practices not even imagined by the framers may collide with constitutional principles. It is the everyday work of the Court to apply constitutional principles to facts and circumstances beyond the ken of the framers.

prong. This approach was endorsed by six Justices of the Court in *Wallace v. Jaffree*, 472 U.S. at 56, and by seven Justices in *Grand Rapids School District v. Ball*, 473 U.S. at 389 (noting further that if a symbolic "link" or "identification" of government with religion conveys a message of endorsement, the Establishment Clause is violated). See also *Edwards v. Aguillard*, 482 U.S. at 583 n.4.

Most recently, in *County of Allegheny v. ACLU*, 492 U.S. at 600-01, this Court has explained the reach of the term "endorsement" as follows:

[T]he very concept of "endorsement" conveys the sense of promoting someone else's message. Thus, by prohibiting government endorsement of religion, the Establishment Clause prohibits . . . the government's lending its support to the communication of a religious organization's religious message.

Petitioners propose no less than a total reconstruction of modern Establishment Clause jurisprudence, developed painstakingly and carefully by this Court over the past four decades. They propose the abandonment of the very cornerstone of what the Establishment Clause is understood to mean. In the process, they disregard the notion of *stare decisis*, which this Court described only a few weeks ago as "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, ___ U.S. ___, 59 U.S.L.W. 4814, 4819 (June 27, 1991).

It is true that *Payne* precipitated a debate among the members of the Court over the scope and meaning of *stare decisis* in constitutional cases. Yet, every member of the *Payne* Court agreed that allegiance to *stare decisis*

is most compelling when the challenged principle of law reflects the accumulated wisdom of a body of precedents stretching back over many years and many courts.¹⁰ That is precisely the situation here. Under these circumstances, this Court has continued to adhere to the proposition that "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Payne v. Tennessee*, 59 U.S.L.W. at 4823 (Souter, J., concurring), quoting *Welch v. Texas Dep't of Highways and Public Transportation*, 483 U.S. 468, 494 (1987). Petitioners have offered no persuasive reason why the doctrine of *stare decisis* should be abandoned in this case.

C. Prayers At Public Middle School Promotional Ceremonies And At Public High School Graduation Ceremonies Fail Each Prong Of The Three-Part *Lemon* Test

1. The Purpose Of Including Prayer In Public Middle And High School Promotional And Graduation Ceremonies Is To Endorse Religion

The only evidence submitted to the district court in this case was contained in the parties' Agreed Statement of Facts. (J.A.10-19, 24).¹¹ The Agreed Statement of Facts contains no evidence of any secular purpose for the inclusion of prayer in the promotional and gradua-

¹⁰ For example, Chief Justice Rehnquist's opinion for the majority in *Payne* stressed that the overruled holding in *Booth v. Maryland*, 482 U.S. 496 (1987), was not "mandated" by any "prior decisions of this Court." 59 U.S.L.W. at 4816. Similarly, Justice Scalia's concurring opinion (joined by Justices O'Connor and Kennedy) described the holding in *Booth* as "a novel rule." *Id.* at 4821.

¹¹ Petitioners have devoted a mere six pages of their brief to a discussion of *Lemon* as applied to the facts of this case.

tion ceremonies of Providence's public schools. Moreover, this Court has often recognized the essential religious nature and manifest religious purpose of prayer. *Wallace v. Jaffree*, 472 U.S. at 72 (O'Connor, J., concurring)(contrasting the "inherently religious" nature of vocal prayer, which is "a religious exercise," to a moment of silence, which may be neither); *Stone v. Graham*, 449 U.S. at 41 (holding that the Ten Commandments is "undeniably a sacred text in the Jewish and Christian faiths"); *Abington v. Schempp*, 374 U.S. at 225 (noting that reading the Bible and recitation of the Lord's Prayer are "religious exercises"); *Engel v. Vitale*, 370 U.S. at 424-25 ("the nature of . . . prayer has always been religious").

Indeed, this Court has never found a valid secular purpose for any type of government sponsored prayer in a public school setting. Rather, in each of the foregoing cases, the Court has firmly and unequivocally rejected any alleged secular purpose for school sponsored prayer and even for school encouragement of prayer:

The addition of "or voluntary prayer" [in the Alabama statute authorizing a period of silence in public schools] indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.

The importance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority. For whenever the State itself speaks on a religious subject, one of the questions that we must ask is "whether the government intends to convey a message of endorsement or disapproval of religion"

... Keeping in mind, as we must, "both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded," we conclude that Section 16-1-20.1 violates the First Amendment.

Wallace v. Jaffree, 472 U.S. at 60-61 (footnotes omitted). See also *Edwards v. Aguillard*, 482 U.S. 578 (holding that the preeminent purpose of a Louisiana statute requiring "Creation Science" to be taught in conjunction with evolution was religious).¹²

Petitioners argue that their practice of including prayer in public school promotional and graduation ceremonies is to "solemnize the occasion" and to provide "recognition and acknowledgment of the role of religion in the lives of our citizens." Pet.Br. at 44 n.43. Petitioners' pretensions to a secular purpose must fail on the facts of this case. It is undisputed that more than half of Providence's middle schools and one of its five high

¹² A number of lower courts have likewise concluded that prayer in various public school gatherings, such as football games, school assemblies, commencement exercises, pep rallies, and athletic contests serve no secular purpose. See *Jager v. Douglas County School District*, 862 F.2d 824 (11th Cir.), cert. denied, 109 S. Ct. 2431 (1989) (striking down invocations delivered prior to public high school football games); *Collins v. Chandler Unified School District*, 644 F.2d 759 (9th Cir.), cert. denied, 454 U.S. 863 (1981) (striking down opening prayers delivered by a student at voluntary school assemblies); *Graham v. Central Community School District of Decatur*, 608 F.Supp. 531 (S.D. Iowa 1985) (holding that invocations and benedictions during commencement exercises serve a Christian religious purpose); *Doe v. Aldine Independent School District*, 563 F.Supp. 883 (S.D. Texas 1982) (holding that a prayer posted over the entrance of a public school gymnasium, sung at athletic contests, pep rallies, and graduation ceremonies has no secular purpose); *Sands v. Morongo Unified School District*, 809 P.2d 809 (Cal.Sup.Ct. 1991) (striking down prayer at commencement). But see *Jones v. Clear Creek Middle School District*, 930 F.2d 416 (5th Cir. 1991) (upholding prayer at commencement).

schools have repeatedly succeeded in producing promotional and/or graduation ceremonies without the use of prayer. Apparently, the officials of those schools have fostered secular means to solemnize and dignify their ceremonies. On these facts, one can only conclude that the officials who chose to include prayer did so because they wished to encourage or endorse prayer itself. *County of Allegheny v. ACLU*, 492 U.S. at 618 ("Where the government's secular message can be conveyed by two symbols, only one of which carries a religious meaning, an observer might reasonably infer from the fact that the government has chosen to use the religious symbol that the government means to promote religious faith").

Petitioners' second asserted secular purpose -- a recognition and acknowledgment of religion -- denies the essential nature of prayer. Prayer is not passive; it is active. Prayer does not merely "recognize" and "acknowledge" religion; "[i]t is a solemn avowal of divine faith and supplication for the blessings of the Almighty." *Engel v. Vitale*, 370 U.S. at 424. If it is not permissible for government to induce and encourage public school children to meditate on the Ten Commandments, if it is not permissible for government to encourage or endorse silent prayer in the classroom, then it is assuredly not permissible for government to choose a clergy who will pray at an important public school function and to choose what kind of prayer that clergy will be allowed to deliver. "[I]t is no part of the business of government to compose . . . prayers for any group of the American people to recite." *Id.* at 425. A government that advises chosen clergy regarding the form of prayer that is acceptable to government officials is in the business of composing prayer. Can there be any doubt that a government that engages in such activities is intending to endorse not only the religion itself, but a particular type of neutered, generic religion? Can there be any doubt that a government that engages in such activities is not

maintaining the neutrality towards religion and between religious beliefs that the Establishment Clause demands? As this Court has stated, "[h]owever desirable . . . [the government's purpose] might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause." *Stone v. Graham*, 449 U.S. at 42.

**2. The Effect Of Including Prayer
In The Promotional And Graduation Ceremonies Of Public
Middle Schools And High
Schools Is To Convey A Message
Of Endorsement Of Religion**

Petitioners do not explain how the inclusion of prayer in the promotional and graduation ceremonies organized, supervised, and run by public school officials can do anything but convey the message that those officials endorse religion as one of the values they are responsible for inculcating. Petitioners simply state these facts: (1) the prayers are delivered and prepared by clergy, rather than by school officials; (2) the ceremony occurs only once in each student's career; (3) the prayers are brief; (4) the prayers do not take place in a classroom; (5) attendance is not mandatory; and (6) parents and friends are present. Pet.Br. at 47-48. Petitioners make no attempt to explain, however, how these facts diminish the religious message of endorsement conveyed by prayer at public school ceremonies. Indeed, they do not.

Consider, from a child's view, the importance of his or her promotional or graduation ceremony. This one day is the culmination and the reward of years of effort. This one day is his or her day to be recognized, applauded, congratulated for his or her achievements. The importance of graduation day for an eighth grade or twelfth grade student cannot be minimized. As the district court recognized:

While the fact that graduation is a special occasion distinguishes this school day from all others, the uniqueness of the day could highlight the particular effect that the benediction and invocation may have on the students. The presence of clerics is not by itself determinative. It is the union of prayer, school, and important occasion that creates an identification of religion with a school function. The special nature of the graduation ceremonies underscores the identification that Providence public school students can make.

App.B at 24a (footnote omitted).

Consider, from a child's point of view, the planning for his or her graduation ceremony. Teachers have selected the format and the program. Teachers have chosen who will deliver speeches, who will sing, who will hand out diplomas. Teachers have decided who will open and close the ceremony and, in this case, teachers have decided that the person who will do this is a member of the clergy. Teachers "practice" the ceremonies with the children who are graduating. They tell the children how to line up, where to walk, where to sit, when to sit and stand, and generally how they should behave. Teachers, in short, are running this show.¹³

Consider, as well, the graduation ceremony itself. It is typical for the children who are being promoted or who are graduating to be seated together, for family and friends to be seated apart. When the ceremony begins, when, in this case, the clergy rises to deliver the invocation -- what will the child see? He will see school offi-

¹³ This Court has recognized the importance of "students' emulation of teachers as role models" as well as "children's susceptibility to peer pressure." *Edwards v. Aguillard*, 482 U.S. at 584.

cials and teachers standing and adopting stances appropriate to prayer. He will have been told to stand himself. Indeed, he will have no choice but to stand himself, for to adopt a stance different from the rest of his classmates and from his teachers will be to cause a disruption in the ceremony. He will hear a prayer being offered. And he will have, inescapably, the sense that teachers and school officials are endorsing and supporting the message being delivered. Moreover, in choosing the clergy, by making him or her part of this important public school ceremony, petitioners have unequivocally lent the support of government "to the communication of a religious organization's religious message." *County of Allegheny v. ACLU*, 492 U.S. at 601.¹⁴

Petitioners have used the machinery of government to encourage participation in a religious exercise. *Wallace v. Jaffree*, 472 U.S. at 73 n.2 (O'Connor, J., concurring). This is a violation of the Establishment Clause.¹⁵

¹⁴ It is useful to consider the differences between the manner in which graduation ceremonies are conducted and the manner in which legislative sessions are conducted -- legislators are free to, and frequently do, enter and leave the legislative chambers at will; they do so, not in a processional, but individually; legislators may enter a legislative session in the middle of the session and leave before it is over; legislators are not compelled to remain quiet during the session, but engage in discussion among themselves; legislators are adults, and have not been told how to behave by others holding a position of authority over them; the progress of a legislative session is much less controlled and more variable than a graduation ceremony.

¹⁵ The brevity of the prayers offered and the fact that attendance at the ceremony is not required of the child are inconsequential. These issues have already been addressed and dismissed as irrelevant by this Court. See *Wallace v. Jaffree*, 472 U.S. 38; *Abington v. Schempp*, 374 U.S. at 224-25; *Engel v. Vitale*, 370 U.S. at 430, 436.

3. Petitioners' Practice Impermissibly Entangles Government With Religion

Petitioners argue that their practices avoid the pitfalls of government entanglement with religion because school officials merely distributed, but did not formulate, the "Guidelines for Civic Occasions," and because school officials do not write or monitor the officiating clergy's prayers. Pet.Br. at 44 n.43. Petitioners do not accurately state the pertinent facts. According to the parties' Agreed Statement of Facts:

Defendant Robert E. Lee, principal of the Nathan Bishop Middle School, received, from Assistant Superintendent of Schools Arthur Zarrella, a document entitled "Guidelines for Civic Occasions" as a guideline for the type of prayer to be included in the graduation ceremony of the Nathan Bishop Middle School Defendant Robert E. Lee, provided to Rabbi Gutterman a copy of the "Guidelines for Civic Occasions" . . . and, in addition, spoke personally to Rabbi Gutterman *to advise him that prayers that he gave at the invocation and benediction should be non-sectarian in nature.*

(J.A.12-13, ¶¶14, 17)(emphasis added). The guidelines in question, published by the National Conference of Christians and Jews, include, among other suggestions, "appropriate" opening ascriptions to be used for the deity in public prayer. (J.A.21). The guidelines also suggest that public prayer should "remain faithful to the purposes of acknowledging divine presence and seeking blessing, not as opportunity to preach, argue or testify." *Id.*

Clearly, petitioners not only choose which religious sects will be represented and will be allowed to pray at

public school ceremonies, they also monitor the types of prayers that are offered and "advise" the clergy chosen as to what types of prayers are acceptable. By so doing, petitioners interfere with the way that the chosen clergy practice their respective religious beliefs. See *Larkin v. Grendel's Den*, 459 U.S. 116, 122 (1982)(state interference with the practice of religious faith violates the First Amendment). This is an impermissible entanglement of government with religion.

D. The Historical Analysis Adopted By The Court In *Marsh v. Chambers* Does Not Save Petitioners' Practice Of Including Prayer In Public School Promotional And Graduation Ceremonies From Constitutional Infirmary

Petitioners attempt to broaden the Court's analysis of the constitutionality of legislative prayer set forth in *Marsh v. Chambers*, 463 U.S. at 791, to encompass the practice of inviting clergy to deliver prayers at public school promotional and graduation ceremonies. The proposition petitioners advance is that "any interpretation of the Establishment Clause faithful to its intended meaning 'must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion.'" Pet.Br. at 30 n.31, quoting *County of Allegheny v. ACLU*, 492 U.S. at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part).

This Court has squarely rejected both *Marsh*'s applicability to practices which impact on the relationship between religion and public education and blind validation of all practices arguably acceptable to the framers' generation. See *Schad v. Arizona*, ___ U.S. ___, 59 U.S.L.W. 4761, 4767 (June 21, 1991). Indeed, the *Marsh* Court itself cautioned that "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional

guarantees." *Marsh v. Chambers*, 463 U.S. at 790. Were historical acceptance alone sufficient to assure the constitutional validity of any given action, the Court would be compelled to uphold such practices as public whipping and racial segregation of schools. *Id.* at 814 n.30 (Brennan, J., dissenting). See also *Committee for Public Education v. Nyquist*, 413 U.S. at 792. Discrimination against non-Christians would also be acceptable. *County of Allegheny v. ACLU*, 492 U.S. at 604-05. Clearly, *Marsh* was not intended to produce such intolerable results.

Nor can *Marsh* be read as validating practices which bring religion into the public education system. This Court first recognized in *Schempp* that historical analyses are misplaced in constitutional inquiries relating to the public schools:

[T]he structure of American education has greatly changed since the First Amendment was adopted. In the context of our modern emphasis upon public education available to all citizens, any views of the eighteenth century as to whether the exercises at bar are an "establishment" offer little aid to decision. Education, as the Framers knew it, was in the main confined to private schools more often than not under strictly sectarian supervision. Only gradually did control of education pass largely to public officials. It would, therefore, hardly be significant if the fact was that the nearly universal devotional exercises in the schools of the young Republic did not provoke criticism; even today religious ceremonies in church-supported private schools are constitutionally unobjectionable.

374 U.S. at 238-39 (footnote omitted). See also *Wallace v. Jaffree*, 472 U.S. at 80 (O'Connor, J., concurring)

("Since there then existed few government run schools, it is unlikely that the persons who drafted the First Amendment, and the state legislators who ratified it, anticipated the problems of interaction of church and state in the public schools"). In *Edwards v. Aguillard*, 482 U.S. at 583 n.4, this Court specifically stated that "a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted." Finally, the *Marsh* Court itself observed that legislative prayers are primarily directed to adults, who are not as readily susceptible to "religious indoctrination" or peer pressure as children. *Marsh v. Chambers*, 463 U.S. at 792.

Thus, petitioners can produce no precedent whatsoever from this Court which supports the extension of *Marsh* to religious practices within the public schools. In fact, each time this Court has addressed the issue, it has flatly rejected petitioners' argument.

II. GOVERNMENT COERCION HAS NEVER BEEN ACCEPTED AS A NECESSARY ELEMENT OF AN ESTABLISHMENT CLAUSE VIOLATION

A. Historically, The Meaning Of The Establishment Clause Was Not Limited To A Prohibition Of Government Coercion Of Religion

Petitioner's principal argument is not that this Court has ever adopted their coercion test, but rather that nearly every modern Justice has fundamentally misunderstood the Establishment Clause. Petitioners urge the Court to throw out all its precedents and start over on the basis of petitioners' version of history.

Petitioners' history is not based on any *particular practice* of the framers with regard to public schools; public schools barely existed. Nor is petitioners' history based on any *principle* articulated by the framers. Petitioners quote the framers denouncing religious coercion, but the invalidity of religious coercion is not at issue. The dispute is over petitioners' further claim that government can aid religion if it does not coerce. Petitioners do not quote the framers saying *that*. Nor do petitioners discuss the only eighteenth century debates that would have posed the issue.

Both then and now, the essence of establishment was the designation or endorsement of a preferred religion. Indeed, the leading historical dictionary defines establishment in terms of recognition, and does not even mention coercion:

Establishment 2. *esp.* The "establishing" by law (a church, religion, form of worship). (See ESTABLISH v. 7)

Establish 7. From 16th c. often used with reference to ecclesiastical ceremonies or organization, and to the recognized national church or its religion.

3 *Oxford English Dictionary* 298 (1933).

This definition is fully consistent with American usage in the period of the framing. Coercion to attend the established church had been abandoned well before the Revolution. T. Curry, *The First Freedoms* 78-104 (1986). Tax support for the established church continued in the southern colonies only up to independence. *Id.* at 136 (Virginia), 150 (South Carolina), 151-52 (North Carolina), 153 (Georgia), 154-57 (Maryland). In New England, tax support continued into the early national period. But in both regions, defenders of establishment tried to save tax support by letting all denominations participate, by letting each taxpayer choose the

church or clergyman to receive his payments and, in Virginia and Maryland, by exempting some citizens entirely. *Id.* at 141, 145 (Virginia), 155-57 (Maryland), 164 (Massachusetts), 180-81 (Connecticut), 185-86 (New Hampshire), 188-89 (Vermont). These efforts to make establishment nonpreferential and noncoercive did not save it. The most important political battle over disestablishment was fought over precisely this issue in Virginia in 1785, and the nonpreferential general assessment was rejected. *Id.* at 140-47. By 1833, the last of these laws had been repealed as inconsistent with the American principle of disestablishment. L. Levy, *The Establishment Clause* 38 (1986).

As tax support and compelled attendance were abandoned, there remained the core of establishment, the endorsement of a state religion. The endorsement issue was most cleanly separated from more coercive forms of establishment in South Carolina and Virginia. The South Carolina Constitution of 1778 declared that "The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State." S.C. Const. art. 38 (1778), reprinted in 6 F. Thorpe, ed., *The Federal and State Constitutions* 3255 (1906).

No one was required to support this religion in any way. No citizen was required to attend services or contribute financial support. The Constitution guaranteed religious toleration and forbade tax support for churches. *Id.* at 3255-56. The established religion in South Carolina consisted of a simple declaration that the state endorsed Protestantism. That violated the contemporary understanding of disestablishment, and the provision was repealed in 1790. See S.C. Const. art. 8 (1790), reprinted in Thorpe at 3264. Petitioners' theory implies that the South Carolina Constitution of 1778 could be validly re-enacted today.

In Virginia, the last vestige of establishment was a

simple act of incorporation for the Protestant Episcopal Church. The act had no coercive effect on the opponents of establishment, but they objected to it because it singled out Episcopalians for "peculiar distinctions" and "particular sanction." T. Buckley, *Church and State in Revolutionary Virginia, 1776-1787* at 165 (1977). The legislature repealed the act in 1787. *Id.* at 170.

In these two instances, Americans of the founding generation actually debated and voted on the question whether government could endorse religion if it did so noncoercively. The answer was no. These debates show how the framers understood disestablishment when they attended to the issue. The dissenting churches, focused on the task of eliminating the former Anglican establishment, insisted on eliminating mere endorsements.

Petitioners ignore this history of real debate over the meaning of disestablishment, and rely instead on a practice that was not debated: prayers and religious declarations among adults in civil ceremonies. These practices were not debated because they were not controversial among Protestants, and there were no other religious minorities with sufficient political strength to raise the issue.

This unexamined Protestant consensus broke down in the face of two developments in the nineteenth century: the emergence of public schools, and large-scale Catholic and Jewish immigration. Catholic complaints about Protestant instruction and Bible reading in the public schools led to political conflict and physical violence. 1 A. Stokes, *Church and State in the United States* 830-35 (1950). It then became clear that in a more pluralistic society, religious observances in public schools caused the same evils that tax support for churches, and endorsements of Episcopalians, had caused in the time of the framers.

The principle was the same in both generations:

government should not support or endorse religion. Such endorsements cause religious strife if they disadvantage any significant group in the community. The framers adopted the principle, and they applied it to all issues that were controversial among Protestants. They did not see its application to practices that substantially all Protestants could accept. But they put the principle in the Constitution, ready to be applied to new examples of the same evil. Protestant-Catholic and Christian-Jewish conflict revealed that government sponsored religious observances, especially among children, caused the very evils that the Establishment Clause had been intended to prevent. American understanding of the reach of the disestablishment principle has expanded with the steady increase in religious pluralism, and the constitutional tradition is reflected in this Court's decisions prohibiting religious observances in public schools.

Petitioners also rely on James Madison's comment that the Establishment Clause meant that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." Pet.Br. at 24. This comment does not help petitioners. It does not state petitioners' position, and it does not describe the version of the Establishment Clause ultimately adopted.

Madison's statement has three clauses: Congress may not (1) establish a religion, (2) enforce observation, or (3) compel worship. Petitioners rely on clauses (2) and (3) and treat them as exclusive. But clause (1) is as broad as the meaning of establishment. If to establish a religion meant to recognize or endorse a religion in the vocabulary of the late eighteenth century, then Madison said that Congress cannot recognize or endorse a religion. Whatever establishment meant, Madison repeated it; he did not define it or limit it.

Madison cannot have meant for his listeners to ignore clause (1) and consider only clauses (2) and (3).

Those two clauses alone would not even prevent tax support for churches. Congress could collect taxes for all religions or a particular religion without compelling anyone to observe that religion or to worship in a particular manner. So with clause (1) included, Madison's statement is entirely consistent with this Court's cases. With clause (1) excluded, Madison's statement is obviously incomplete, even narrower than petitioners' position.

Whatever Madison meant in this isolated comment is of little moment.¹⁶ The House promptly rejected the draft Madison had paraphrased, and adopted Mr. Livermore's sweeping substitute: "Congress shall make no laws touching religion, or infringing the rights of conscience." 1 *Annals of Cong.* 731 (J. Gales ed. 1834). Any law referring to religion in any way would "touch" religion; adoption of the Livermore amendment is inconsistent with the claim that this discussion in the House confined the Establishment Clause to coercion.

The clause was further redrafted in the Senate and the Conference Committee. Those debates were not recorded, but votes in the Senate Journal reveal an unsuccessful attempt to narrow the clause to forbid only those establishments that preferred a particular sect, society, or denomination. Four such drafts were ultimately rejected. 3 L. de Pauw, ed., *Documentary History of the First Federal Congress of the United States of America* 151, 166, 220 (1972). The draft that was finally ratified is one of the most sweeping considered by either House. It forbids not just the establishment of religion, but any law *respecting* an establishment. It does not merely forbid es-

¹⁶ Indeed, Madison himself would have denied the legitimacy of considering this statement. Madison and the other framers believed that the Constitution should be construed in light of the text adopted and the evils to be eliminated, without reference to legislative history. See Baade, "Original Intent" in Historical Perspective: Some Critical Glosses," 69 *Tex.L.Rev.* 1001 (1991); Powell, "The Original Understanding of Original Intent," 98 *Harv.L.Rev.* 885 (1985).

tablishment of a church or even of "a" religion; it forbids "establishment of religion" generally. See Laycock, "Nonpreferential Aid to Religion: A False Claim about Original Intent," 27 Wm. & Mary L.Rev. 875, 881-82, 886 (1986).

There is no reason to believe that this sweeping clause used "establishment" in less than the full sense accorded to the phrase by the opponents of established religion. Historical usage as reflected in the dictionary, and contemporary political debates over disestablishment in the states, both show that the word included recognition and endorsement. That is what the Establishment Clause prohibits. That is what this Court has always said the Establishment Clause prohibits. Petitioners' attempt to rewrite history ignores the most important evidence.¹⁷

B. This Court Has Consistently Rejected Coercion As A Necessary Element Of An Establishment Clause Violation

Not only does history fail to support petitioners' thesis that coercion is a necessary element of an Establishment Clause violation, but this Court has repeatedly rejected such a proposition, both specifically and by inference. Beginning with *Everson v. Board of Education*, 330 U.S. 1, this Court has clearly understood the Establishment Clause to reach beyond a prohibition of government coerced participation in religion:

The "establishment of religion" clause of the First Amendment means at least this: Neither a State nor Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or

¹⁷ A far more extensive historical analysis appears in the Brief *Amicus Curiae* of the American Jewish Committee, *et al.* Respondent fully endorses that analysis.

prefer one religion over another. Neither can force *nor influence* a person to go to or to remain away from church against his will or force him to prefer a belief or disbelief in any religion Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.

Id. at 15-16 (emphasis added). The *Everson* Court clearly envisaged constitutional protection against noncoercive governmental involvement in religion.

In *Engel v. Vitale*, 370 U.S. at 430, the Court specifically held that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." This Court has consistently and unconditionally adhered to this principle whenever presented with a "coercion" argument. See *Abington v. Schempp*, 374 U.S. at 224-25 ("Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause"); *Committee for Public Education v. Nyquist*, 413 U.S. at 786 ("[W]hile proof of coercion might provide a basis for a claim under the Free Exercise Clause, it was not a necessary element of any claim under the Establishment Clause"); *Wallace v. Jaffree*, 472 U.S. at 60 n.51.

Most recently, Justice O'Connor addressed this issue in her concurrence in *County of Allegheny v. ACLU*, 492 U.S. at 627-28 (citations omitted):

An Establishment Clause standard that prohibits only "coercive" practices or overt efforts at government proselytization . . . but

fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community. Thus, this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis To require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy Moreover, as even Justice Kennedy recognizes, any Establishment Clause test limited to "*direct coercion*" clearly would fail to account for forms of "[S]ymbolic recognition or accommodation of religious faith" that may violate the Establishment Clause.

The core of the doctrine which petitioners exhort the Court to adopt is summarized in one sentence -- "Religious speech alone cannot amount to the kind of government coercion of religious choice that implicates the Establishment Clause." Pet.Br. at 36. Petitioners openly suggest that government may participate in religious debates, may encourage religion, and may criticize religious expression. *Id.* at 37. The government need not be neutral towards religion generally or towards particular religious sects so long as it does not force or fund the practice of religion. *Id.* The breadth of government practices which would be constitutionally acceptable under petitioners' doctrine is startling -- government officials would be allowed to exhort citizens to join a favored sect; conversely, the same officials would be free to publicly condemn a disfavored sect. Government would be able to sponsor a Roman Catholic mass, an evangelical prayer meeting, or any other type of religious service the

officials in power happen to favor. Indeed, under petitioners' doctrine, joined by the Solicitor General, government would actually be allowed to sponsor a church, so long as no one was forced to join and no tax funds were used to support it. Petitioners cannot possibly invoke historical precedent in support of this argument, for the genesis of the Establishment Clause arose from the religious persecution borne of such sponsorship. See *Engel v. Vitale*, 470 U.S. at 431 ("The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs").

In interpreting the meaning of the Establishment Clause, this Court has recognized, as it must, that the religious complexion of the country today is vastly different than it was at the time the First Amendment was ratified. *Abington v. Schempp*, 374 U.S. at 240-41 (Brennan, J., concurring); *Edwards v. Aguillard*, 482 U.S. at 607 n.6 (Powell, J., concurring). While many government practices favoring Christianity may have been acceptable to the framers' generation, they are no longer acceptable if we are to honor the spirit of both the Free Exercise and the Establishment Clause. *County of Allegheny v. ACLU*, 492 U.S. at 630 (O'Connor, J., concurring). This Court has always so held. *Wallace v. Jaffree*, 472 U.S. at 52. To accept petitioners' doctrine would destroy the concept of government neutrality towards religion and would open the door for the very evils the Establishment Clause was intended to prevent.

C. Although Coercion Has Never Been Held To Be A Necessary Element Of An Establishment Clause Violation, Petitioners' Practice Is Nonetheless Coercive

Petitioners advocate an extraordinarily narrow definition of coercion. In so doing, they suggest that this Court eliminate common sense from judicial decision-making.

In case after case, the Court has acknowledged and considered the coercive effect of subtle actions of government officials, especially when those actions impact on children within the public education system. Even Justice Stewart, who advocated an interpretation of the Establishment Clause restricted to government coercion of religious beliefs, recognized the indirect coercive pressures operating on public school children:

[A] law which provided for religious exercises during the school day and which contained no excusal provision would obviously be unconstitutionally coercive upon those who did not wish to participate. And even under a law containing an excusal provision, if the exercises were held during the school day, and no equally desirable alternative were provided by the school authorities, the likelihood that children might be under at least some psychological compulsion to participate would be great.

Abington v. Schempp, 374 U.S. at 318 (Stewart, J., dissenting).

The subtle pressure upon children to conform to their peers and to emulate teachers has been recognized and acknowledged in every modern decision of this Court involving religion in the public schools. See, e.g., *Engel v. Vitale*, 370 U.S. at 431 ("When the power, prestige and financial support of government is placed be-

hind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain"); *Grand Rapids School District v. Ball*, 473 U.S. at 390 ("The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as a free and voluntary choice"); *Wallace v. Jaffree*, 472 U.S. at 60 n.51, 71 (O'Connor, J., concurring); *Edwards v. Aguillard*, 482 U.S. at 584 ("The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure"); *Board of Education v. Mergens*, 110 S.Ct. at 2378 (Kennedy, J., concurring) ("This inquiry [with respect to coercion] must be undertaken with sensitivity to the special circumstances that exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw").

The very type of subtle pressure which the Court has previously described as coercive operates in this case on children who are being promoted from middle school or are graduating from high school in the Providence school system. Because coercion was not raised as an issue before the district court, no facts were developed by either party with regard to coercion, other than the mere acknowledgement that attendance at graduation and promotional ceremonies is not mandatory for students. (J.A.18, ¶41). However, this Court need not blind itself to the realities of how promotional and graduation ceremonies are conducted, nor to the importance of those ceremonies to the children involved, nor to the coercion inherent in government proselytizing on behalf of religion. No choice is offered to a child who is offended by the inclusion of prayers in the ceremony except to forego attendance altogether. Graduation ceremonies are organized and formal affairs. The children who are to be

recognized enter and leave the room together, after family and friends have already been seated. They enter in a processional, anxiously and proudly watched by their families. In the unlikely event that the child were allowed to avoid coerced participation in prayer by leaving the room, there is overwhelming pressure not to take such obvious nonconforming action. Imagine the embarrassment and humiliation of a nonadhering child who attempts to withdraw from the room as all of his or her classmates are standing to begin an opening prayer. To deny that a child who wished to take such action is not coerced into conformity is nonsensical. As Justice O'Connor observed when discussing voluntary school prayer:

Under all of these statutes, a student who did not share the religious beliefs expressed in the course of the exercise was left with the choice of participating, thereby compromising the nonadherent's beliefs, or withdrawing, thereby calling attention to his or her nonconformity. The decisions acknowledged the coercion implicit under the statutory schemes.

Wallace v. Jaffree, 472 U.S. at 72 (O'Connor, J., concurring)(citations omitted). Withdrawing from part of a graduation ceremony is clearly even more disruptive than withdrawing from a classroom, and there is a concomitant increase in the coercive pressure on a student not to take such action, even if it were allowed.

If the nonadhering child chooses to be present during his or her promotional or graduation ceremony and not to withdraw during periods of prayer, he or she is subject to the additional subtle coercion inherent in proselytizing. The Court found in *Stone v. Graham* that the mere posting of religious texts on a schoolroom wall may have the effect of inducing school children "to read, meditate upon, perhaps to venerate and obey, the Com-

mandments." 449 U.S. at 42. If the mere posting of a religious text may have such an effect, how much more of an effect will be realized from group prayer, spoken out loud.

The child who objects to prayer is thus left with only one choice -- not to attend his or her promotional or graduation ceremony. No "equally desirable alternatives" are available. *Abington v. Schempp*, 374 U.S. at 318 (Stewart, J., dissenting). It is difficult to imagine how anyone could seriously argue that the child faced with such a choice is under no pressure to conform to the majority's notion of acceptable behavior. The message which the school and its teachers are delivering to the nonadhering child is clear:

We have chosen to include in this all-important ceremony a prayer delivered by a religious person whom we have also chosen. This is your graduation; however, if your beliefs are offended by our choice of religion, you are free to miss your graduation. We will mail you a diploma.

Such a choice, delivered by teachers and government, is nothing short of cruel. It is surely not voluntary in any judicially cognizable sense, and cannot be constitutional under the First Amendment.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the First Circuit should be affirmed.

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(3)
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In The
Supreme Court of the United States
October Term, 1991

ROBERT E. LEE, ET AL.,

Petitioners,

v.

DANIEL WEISMAN, ETC.,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The First Circuit

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ARGUMENT

I. RESPONDENT'S "NEUTRALITY" TEST IS UNWORKABLE AS A JURIDICAL TOOL, PRODUCING RESULTS UNFAITHFUL TO THE PRINCIPLE EMBODIED IN THE ESTABLISHMENT CLAUSE.

A. Respondent's Construction of the Establishment Clause Requires an Exclusively Secular Civic Life for this Nation.

Respondent argues that *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is the "distillation" of a body of precedent teaching judges to use government "neutrality" toward religion as a standard with which to measure the bounds of the Establishment Clause. Resp. Br. at 16-17. This test, according to Respondent, includes the notion that government is not to act so as to communicate a "message of endorsement" of religion. Resp. Br. at 22-23. Since, in Respondent's mind, the reference to God in Rabbi Gutterman's graduation invocation and benediction constitutes such an endorsement, it is unconstitutional. Resp. Br. at 28-30. The rabbi's reference to God was not "neutral" toward God, and thus was an establishment of religion. Respondent's understanding of the Establishment Clause's requirements punctuates the point advanced in our opening brief: If the familiar and venerable tradition of graduation invocations and benedictions violates the Establishment Clause, what civic expression of religious belief does not?

Respondent, obviously aware of the startling sweep of his vision of the Establishment Clause, opens his argument with an attempt at reassurance. This case, Respondent says, is not about "prayer during presidential inaugurations, congressional sessions, and proclamations of National Days of Thanksgiving." Resp. Br. at 11. But nowhere in his brief can Respondent bring himself to say that those cases, no doubt soon to follow if Respondent prevails here, would or could come out differently under his analysis. Surely our national motto – "In God We Trust" – and our Pledge of Allegiance must be forbidden government "endorsements" of religion

under Respondent's view of the "neutrality" required by the Establishment Clause.

Respondent fails to articulate any principled limits on his analysis because his analysis is logically not susceptible to any limit short of its goal: The complete elimination from American civic life of all expressions of religious sentiment. Counsel for one of Respondent's *amici* has explained elsewhere the logic of Respondent's notion of government "neutrality" toward religion:

[The Supreme Court] should not have held that chaplains can open each meeting of a state legislature with prayer, or that municipalities can erect Christmas displays. These decisions are wholly unprincipled and indefensible. A little bit of government support for religion may be only a little bit of establishment, but it is still an establishment. The government should not put "In God We Trust" on coins; it should not open court sessions with "God save the United States and this honorable Court"; and it should not name a city or a naval vessel for the Body of Christ or the Queen of the Angels.

Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 8 (1986).¹

¹ Prof. Laycock's conclusions concerning the results of the "neutrality" or "no-endorsement" test are shared by some other commentators. See, e.g., Jones, "In God We Trust" and the Establishment Clause, 31 J. of Church & State 381, 382 (1989) ("God-references fail the Supreme Court's Establishment Clause doctrines . . ."); Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266, 307 (1987) ("The No-Endorsement Test") ("Ceremonial uses of prayer, such as the invocation given before a legislative session, or public religious allusions such as the motto on coins confessing 'In God We Trust,' may communicate support or approval for religious beliefs."); Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 69 N.C. L. Rev. 1049, 1055-58 (1986) ("Rethinking Government Neutrality") (concluding that the Pledge

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Some lower courts have embraced this logic of the "neutrality" or "no-endorsement" standard, as can be seen in cases such as those invalidating city seals with religious imagery,² as well as in the district court's conclusion below that "God has been ruled out of public education." App. 21a.³

The arguments of Respondent and his *amici* underscore how the secularizing principle they espouse, if indeed embraced by the Constitution, would be amplified in modern American society. They take pains to point out that public schools came along decades after the founding generation. Resp. Br. at 37-38; American Jewish Cong. Br. at 25-32. That is true; indeed, modern American government is no doubt far more pervasively involved in the lives of Americans – both individually and as communities – than the Framers ever contemplated. If Respondent's view of "neutrality" is the rule courts are to apply under the Establishment Clause, the innumerable ways the modern state touches our lives means that a

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of Allegiance and the opening of Supreme Court sessions violate the Establishment Clause); Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 Wm. & Mary L. Rev. 943, 947 (1986) ("The placement of 'In God We Trust' on coins and currency . . . seems to have no real purpose other than a religious one. Moreover, the proclamations by almost all our Presidents of national days of Thanksgiving to 'Almighty God' only seem fairly characterized as having a religious purpose."); Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 Conn. L. Rev. 739, 746 n.30 (1986) (urging the elimination of "all references to God in public life").

² See, e.g., *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir.), petition for cert. filed, 60 U.S.L.W. 3083 (U.S. July 19, 1991) (No. 91-141); *Friedman v. Board of County Commissioners*, 781 F.2d 777 (10th Cir. 1985), cert. denied, 476 U.S. 1169 (1986). See also *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 3654 (U.S. Mar. 15, 1991) (No. 90-1448).

³ "App." denotes the Appendix to the Petition for a Writ of Certiorari.

sweeping purge of religious expression from broad ranges of our social intercourse must be in order. *See* Pet. Br. at 8-9.⁴

Though Respondent's *amici* claim that their analysis of the Establishment Clause "is a helpful way of explaining that it is not a forbidden benefit to religion to exempt conscientious objectors or otherwise remove burdens from religious practice," American Jewish Cong. Br. at 45, this conclusory statement reveals more their appreciation of the reach of their thinking than some principled way to limit it. As a logical matter, "accommodation" and "endorsement" are not so readily distinguished,⁵ and, as a practical matter, commonly spring from the same motivation.⁶ This weakness of their "no-endorsement" test as a doctrinal tool is illustrated by criticism from supporters of that test directed at *Lynch v. Donnelly*, 465

⁴ *See also* McConnell, *Book Review*, 6 Const. Commentary 123, 124-25 (1989) (reviewing T. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (1986)) ("As the scope of government expands into areas that formerly were private and often religious (such as education and social welfare), excluding religion from the governmental sphere becomes a powerful engine of secularization.").

⁵ *See, e.g., The No-Endorsement Test* at 282 ("Far from being mutually exclusive, 'accommodation' and 'endorsement' of religion are much more likely to coincide. Asking whether a law beneficial to religion is an 'endorsement' or an 'accommodation,' therefore, is no more sensible than asking whether a lemon is yellow or sour; the answer in each case is, 'Both.' "). Under Respondent's analysis, providing a government benefit, such as unemployment compensation, solely on account of an individual's religious practices must be seen as a forbidden government endorsement of religion, suggesting that cases like *Thomas v. Review Board*, 450 U.S. 707 (1981), and *Sherbert v. Verner*, 374 U.S. 398 (1963), must be discarded if Respondent prevails here.

⁶ *See, e.g., McConnell, Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 47 ("Legislative history in an accommodation case is quite likely to reveal that the legislators who cared enough to sponsor the legislation were those who approved of the religious practice in question.").

U.S. 668 (1984), upholding a town's sponsorship of a nativity scene in a Christmas display, criticism based on the conclusion that the creche constituted an unconstitutional endorsement of religion.⁷

Trying to circumscribe the broad implications of his position for all manner of public acknowledgments of religious values, Respondent seeks to emphasize the "public school setting" as a "crucial" distinction for reaching what he urges as the proper outcome here. Resp. Br. at 11. Yet Respondent's theory that the Establishment Clause mandates government "neutrality" toward religion surely undermines his notion that the "public school setting" is distinct from other civic ceremonies under the Establishment Clause as he understands it. Neutrality is a goal obviously not dependent on a setting nor made more constitutionally endangered in a local public school, as opposed to the chamber of the national legislature or the supreme judicial body of the land. In short, nothing about the graduation setting logically identifies what Respondent advances as "the essential nature of this case," Resp. Br. at 11, in terms of the very analysis Respondent wishes this Court to adopt. That setting thus cannot serve to cabin the expansive implications of Respondent's interpretation of the Establishment Clause.

Close and candid examination of the "no-endorsement" standard thus brings to mind the observation made by Justice Kennedy, joined by the Chief Justice and Justices White and Scalia:

Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and

⁷ *See, e.g., Rethinking Government Neutrality* at 1065. In *Lynch*, Justice O'Connor's understanding of "endorsement" did not extend so far as to render Thanksgiving proclamations, the national motto, judicial ceremonies, and the like unconstitutional, *id.* at 692-93 (O'Connor, J., concurring), as would Respondent's theory. Indeed, we submit that under the endorsement analysis articulated by Justice O'Connor, the graduation prayers here do not constitute an Establishment Clause violation. *See* Pet. Br. at 44 nn.42-43.

stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent. Neither result is acceptable.

County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). Strikingly, almost 30 years ago Justice Goldberg warned – while invalidating Bible reading and prayer in public classrooms – that “untutored devotion to the concept of neutrality” could lead to the exact result now sought by Respondent and achieved by the vision of the Establishment Clause he advances;⁸ “a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.” *Abington School Dist. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).⁹ A doctrinal tool that leads lower courts on this drive towards the secular is at war with “the central role religion plays in our society,” *Allegheny County*, 492 U.S. at 657

⁸ By their discussion of *Lemon* and the cases that preceded it, Respondent and his *amici* seem to imply that these precedents have produced workable doctrine with which courts can faithfully and consistently apply the Establishment Clause. See, e.g., Resp. Br. at 16-23; American Jewish Cong. Br. at 32-48; Council on Religious Freedom Br. at 4-12. In so doing, Respondent and his *amici* have simply ignored the substantial criticism directed at *Lemon* and related cases by members of this Court and by respected scholars. See Pet. Br. at 12 and nn.10-11. “Although the *Lemon* test has survived for over a decade and a half, few have found the formulation satisfactory.” *The No-Endorsement Test* at 269.

⁹ Exclusively secular criteria for all spheres of government activity produce results far from “neutral.” See, e.g., McConnell, *Neutrality Under the Religion Clauses*, 81 Nw. U.L. Rev. 146, 162 (1986) (“If the public school day and all its teaching is strictly secular, the child is likely to learn the lesson that religion is irrelevant to the significant things of this world, or at least that the spiritual realm is radically separate and distinct from the temporal. However unintended, these are lessons about religion. They are not ‘neutral.’ Studious silence on a subject that parents may say touches all of life is an eloquent refutation.”).

(Kennedy, J., concurring in the judgment in part and dissenting in part), and with the rule of law established by the Framers of the First Amendment.

B. The Framers’ Disestablishment Decision Sought to Protect Religious Choice from Government Coercion, Not to Exclude Religious Expression from Civic Life.

The constitutional analysis of Respondent and his *amici* rests on a fundamentally confused interpretive methodology, particularly with respect to the use and significance of historical evidence of the Establishment Clause’s intended meaning. In short, Respondent and his *amici* seek to dismiss altogether the direct evidence of what the Framers meant – the statements and conduct of the Framers themselves. Instead, they urge us to look to the history of certain public school controversies that occurred almost a century after the Establishment Clause was framed and adopted, and to what the states did in implementing their own disestablishment policies at the time of the Founding.

In his effort to draw this Court’s attention away from the voluminous contemporaneous statements and practices of the Framers, Respondent first caricatures our reliance upon this direct and compelling evidence of the Framers’ understanding of the Establishment Clause. According to Respondent, our historical analysis reduces to “anything the Founders did is OK.” American Jewish Cong. Br. at 21.¹⁰ We make no such claim. After all, as Respondent correctly suggests, Congress adopted the Sedition Act of 1798, when memories of the framing and ratification of the First Amendment were still fresh. But the Sedition Act provoked a “great controversy” and was “vigorously condemned as unconstitutional.” *New*

¹⁰ Respondent’s brief discusses historical evidence only briefly, Resp. Br. at 34-40, but “fully endorses” the “more extensive historical analysis” of *amici* American Jewish Congress, et al. *Id.* at 40 n.17. We will therefore attribute to Respondent all historical arguments made by those *amici*.

York Times Co. v. Sullivan, 376 U.S. 254, 273-74 (1964). Jefferson (who, along with Madison, led the attack) denounced the Act as "a nullity, as absolute and palpable as if Congress had ordered us to fall down and worship a golden image." *Id.* at 276.

In contrast, the historical examples of official religious activity described in our opening brief were uncontroversial, inspiring no constitutional crisis, no storm of protest, not even reported litigation. Thus while we grant that it is theoretically possible that the Framers of a constitutional provision could contemporaneously and openly engage in a wide range of practices that they understood to violate that provision, we find it highly unlikely, to say the least, that such dishonorable conduct could pass without exciting substantial public controversy and constitutional challenge.

Respondent, however, advances precisely the opposite proposition – that this Court should dismiss as irrelevant the Framers' contemporaneous religious statements and practices *because they were not controversial*. Resp. Br. at 37-38; American Jewish Cong. Br. at 20-25. According to Respondent, "[g]overnment prayer and religious proclamations" were not controversial in the Founders' time because "the nation was overwhelmingly Protestant, and no significant group of Protestants was victimized by these practices." American Jewish Cong. Br. at 25-26. *See* Resp. Br. at 37-38. This "unexamined Protestant consensus," broke down in the latter half of the nineteenth century, when Catholic complaints about Protestant instruction and Bible reading in the schools led to political turmoil.¹¹ Only then, says Respondent, did it become clear that government prayer and religious proclamations violate the Establishment Clause. From this premise,

¹¹ These practices apparently continued in one form or another until they were definitively declared unconstitutional in *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington School Dist. v. Schempp*, 374 U.S. 203 (1967). As we noted in our opening brief, classroom prayer and Bible reading do implicate the principle of the Establishment Clause: the protection of individual religious choice from government coercion. Pet. Br. at 35-44.

Respondent invites this Court to adopt the following interpretive reasoning:

"The [constitutional] principle was the same in both generations: government should not support or endorse religion The framers adopted the principle, and they applied it to all issues that were controversial among Protestants. They did not see its application to practices that substantially all Protestants could accept. But they put the principle in the Constitution, ready to be applied to new examples of the same evil."

Resp. Br. at 37-38. *See* American Jewish Cong. Br. at 29-32; Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 913-14 (1986).

Adoption of Respondent's interpretive theory requires acceptance of one of two conclusions, neither of which is tenable. Either the Founders *knowingly* engaged in unconstitutional practices – "[g]overnment prayer and religious proclamations" – because no one complained, or the practices that they engaged in were constitutional until someone complained. The first conclusion follows from Respondent's notions that the principle of the Establishment Clause was clear – no "endorsement" of religion – and that an "avowal of divine faith," such as prayer, is a clear "endorsement" of religion. Resp. Br. at 27; *see* American Jewish Cong. Br. at 51-52. It follows that the Founders frequent and official avowals of faith were intentional and knowing constitutional violations.¹² We submit that the more plausible reading of the history surrounding the framing of the First Amendment is

¹² Nor can the Founders' religious practices be viewed as some kind of ubiquitous constitutional mistake. The Founders and their intellectual forbears repeatedly explain their establishment philosophy in terms that indicate that they had given the proper relationship of government and religion much careful thought. *See* Pet. Br. at 14-18; Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 Tex. L. Rev. 955, 962-75 (1989) ("Separation").

that the Framers' religious statements and conduct as government officials were not controversial because they were viewed as clearly consistent with the principle embodied in the Establishment Clause.

The alternative conclusion that could flow from Respondent's argument – that official expressions of religious values were constitutional until they became controversial almost a century after ratification of the First Amendment – obviously represents a novel approach to constitutional adjudication. No one would dispute, certainly not Petitioners, that a constitutional safeguard applies to "new examples of the same evil." Resp. Br. at 38. As we put it in our opening brief, "the First Amendment prohibits modern methods of establishing a religion no less than it prohibits ancient ones." Pet. Br. at 31 n.32 (emphasis omitted). But governmental expressions of religious values are not new. And a practice that was so plainly understood by the Framers to be outside the Establishment Clause's prohibitions does not come within it, *ipso facto*, simply because the practice, in a different age, becomes "controversial."

In sum, we reiterate our opening brief's point that this case is governed by the *Marsh* Court's common sense observation that, "[i]n this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress – their actions reveal their intent." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983); Pet. Br. at 30. The only rational conclusion that can be drawn from the historical record is not that the religious statements and conduct of the Framers were constitutionally invalid because they were not controversial, but rather that they were not controversial because they were not constitutionally invalid.

The only historical evidence offered by Respondent that relates to the relevant time frame – the founding period – focuses exclusively on the legislative development of disestablishment within the states. The Establishment Clause, however, did not even apply to the states at that time; indeed, it had been specifically framed to ensure that Congress would

be disabled from interfering with state establishments. See note 22, *infra*. Quite apart from the doubtful relevance of the state practices cited by Respondent, see *Allegheny County*, 492 U.S. at 670 n.7 (Kennedy, J., concurring in the judgment in part, and dissenting in part) ("[T]he relevant historical practices are those conducted by governmental units which were subject to the constraints of the Establishment Clause."),¹³ the substance of those state practices has been seriously mischaracterized by Respondent.

For example, Respondent contends that the South Carolina Constitution of 1778 contained only "a bare endorsement" of the Christian Protestant religion as the established religion of the state, but that it was nevertheless found to be an unacceptable establishment of religion, despite the lack of

¹³ One of Respondent's *amici* offers a quotation from Jefferson which it contends supports the relevance of early state practice in construing the Establishment Clause. National PEARL Br. at 13 n.21. Examination of the full letter from which the quotation is drawn, however, shows the opposite to be the case. In this letter, Jefferson discusses the practice of the preceding Presidents in issuing Presidential Proclamations of Prayer, in explaining why he, virtually alone among the Presidents, refused to do so on Establishment Clause grounds, believing such proclamations to have a coercive effect. See Pet. Br. at 33-34. Jefferson believed he was so constrained not only because of the Establishment Clause, but also because of the Constitution's provision "which reserves to the states the powers not delegated to the U.S." T. Jefferson, Letter to Rev. Samuel Miller, in 5 *The Founders' Constitution* 98 (P. Kurland & R. Lerner eds. 1987) (*"The Founders' Constitution"*). He then goes on:

I am aware that the practice of my predecessors may be quoted. But I have ever believed that the example of state executives led to the assumption of that authority by the general government, without due examination, which would have discovered that *what might be a right in a state government, was a violation of that right when assumed by another.*

Id. at 99 (emphasis added). Based on this evidence, at least, Jefferson clearly believed that the states may engage in practices that are not prohibited by the Establishment Clause, and, consequently, understood that such state practices are not evidence of what was prohibited by the Clause.

coercion, and was repealed in the Constitution of 1790. See Resp. Br. at 36; American Jewish Cong. Br. at 3, 14-16. Far from articulating "a bare endorsement of religion," the 1778 South Carolina Constitution mandated numerous coercive requirements.¹⁴ Indeed, widely noted historian Anson Phelps Stokes concluded that the 1778 Constitution included "detailed provisions to insure a Protestant state probably . . . without parallel in our national history." 1 A. Stokes, *Church and State in the United States* 432 (1950) ("*Church and State*").

Respondent and his *amici* similarly claim that Virginia created "a bare endorsement" of the Episcopal Church, without any coercion, through the 1784 statute "for incorporating the Protestant Episcopal Church." They again argue that this "bare endorsement" without coercion was found to be an unacceptable establishment of religion and was subsequently repealed. See Resp. Br. at 36-37; American Jewish Cong. Br. at 3, 12-14, 16. But the incorporation statute nowhere stated that the Episcopal Church was to be the established, official church of the state. T. Buckley, *Church and State in Revolutionary Virginia 1776-1787* 106-07 (1977) ("*Revolutionary*").

¹⁴ Articles 3, 12, and 13 provided that only members of the Protestant religion could serve in state offices. Under Article 13, only persons who acknowledged a belief in God and in a future state of rewards and punishments could vote. These coercive features of the South Carolina Constitution of 1778 are pointed out by one of Respondent's other *amici*. See National PEARL Br. at 14. Article 38 of the 1778 Constitution stated that religious toleration would be granted only to persons and religious societies that acknowledge a belief in one God, and a future state of rewards and punishments, and that God is to be publicly worshipped. "Equal religious and civil privileges" were guaranteed only to "denominations of Christian Protestants." In order to "be, and be constituted a church," and become incorporated, a church organization had to subscribe to five designated articles of faith. In addition, no one was allowed to be a minister of a legally recognized church unless they subscribed to the five specified articles of faith, and several additional beliefs. See 6 F. Thorpe, *The Federal and State Constitutions* 3248-57 (1906) ("*Federal and State Constitutions*").

Virginia"); *Church and State* at 384-87. Indeed, Respondent's *amici* admits that the "state's endorsement was implicit rather than explicit." American Jewish Cong. Br. at 13. Yet even the characterization of the Act as an "implicit endorsement" does not withstand scrutiny.

The Act transferred authority over the organization and operation of the church, which *had been* the established church, from the state to the church. To execute this *disestablishment*, the Act transferred the formerly state-owned property used by the church, including church buildings, surrounding land, and "glebes" farmed for the support of ministers, to church ownership. *Church and State* at 384-87; *Revolutionary Virginia* at 106-07. The statute incorporated the church, not to implicitly endorse it as the established church, but because the church now needed a legal form or entity distinct from that of the state to hold that property and to otherwise go about its affairs. James Madison himself, as a member of the Virginia Assembly, voted for the bill, explaining: "The necessity of some sort of incorporation for the purpose of holding and managing the property of the church could not well be denied, nor a more harmless modification of it now obtained." *Church and State* at 386. See also *Revolutionary Virginia* at 106-07. Indeed, the support of Madison and his allies in the Assembly created the majority in favor of the bill.¹⁵

¹⁵ *Church and State* at 386. Moreover, the controversy regarding repeal of the Act arose out of the grant of the formerly state property to the church, not that the bill provided an "endorsement" of the Episcopal Church. *Revolutionary Virginia* at 65-72, 140, 167, 171. While the legislature had originally viewed the grant of state property in the incorporation act as clarifying the effective current property rights of the Episcopal Church, *id.* at 166-69, the repeal forces viewed the Act as effectively granting a large amount of state financial aid, raised by coercive general taxation, to the Church. The motivating concern behind the repeal movement was, therefore, a coercive practice that from the dissenters' perspective hardly amounted to a "bare endorsement." Indeed, because the 1787 repeal of the incorporation act left the property in

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Respondent argues that the Virginia general assessment bill proposed by Patrick Henry in 1785 did not involve coercion, but was nevertheless rejected as an establishment of religion. Resp. Br. at 35-36; American Jewish Cong. Br. at 16-17. The bill, however, clearly was coercive. Each taxpayer's funds were to be distributed to the Christian denomination designated by that taxpayer, or to a general state fund that would be used to support the local schools in each county. All schooling at the time was private and inextricably intertwined with religious values and teachings.¹⁶ Thus, whether directed to a denomination of the taxpayer, or distributed to a school by a state fund, such assessments unavoidably compelled taxpayers to contribute to certain religious activities.¹⁷

Notably, parties on both sides of the assessment debate did not question the compulsion involved in an assessment. Proponents of assessments expressly acknowledged their coercive effects, arguing that since all received the civil benefits of a religious citizenry, all should be compelled to contribute to religion.¹⁸ Madison, the leading opponent of the

(Continued from previous page)

church hands, the controversy continued after repeal of the incorporation act, until 1802, when the legislature authorized the seizure and sale of all the property granted to the Episcopal Church in the 1784 act, except the church buildings and their immediate surrounding land. *Id.* at 170-72.

¹⁶ See, e.g., J. Whitehead, *The Rights of Religious Persons in Public Education* 41-42 (1991); R. Michaelsen, *Piety in the Public School* 80-81, 85 (1970); F. Eby and C. Arrowood, *The Development of Modern Education in Theory, Organization and Practice* 538-39, 548-49 (1934).

¹⁷ The fact that ministers and church organizations led the fight for state-mandated assessments further indicates that the practical effect of an assessment was to compel contributions to denominations that might not have been made voluntarily.

¹⁸ See *Church and State* at 388 (The first petition asking for the general assessment bill complained that without it the people were "left without the smallest coercion to contribute to" religion, and asked for an act "to compel every one to contribute something . . . to the support of religion."); *First Freedoms* at 138-140, 145.

Virginia assessment, opposed the bill precisely because of its coercive quality, as he eloquently set out in his historic *Memorial and Remonstrance*. Pet. Br. at 21-22.¹⁹ While the assessment bill provoked debate over many issues, the permissibility of a "bare endorsement" of religion was not among them.²⁰

The arguments of Respondent and his *amici* that purport to draw on history fail not only because they do not seriously challenge the conclusion that coercion of religious choice was the focus of the Framers,²¹ but because they also do not

¹⁹ See also J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 136, 144-45, 147 (1990) ("*First Freedoms*"); *Church and State* at 389-391; *Revolutionary Virginia* at 138, 140, 149-51.

²⁰ Respondent and his *amici* attempt to use the Maryland assessment bill, also rejected in 1785, to the same effect. Resp. Br. at 35-36; American Jewish Cong. Br. at 17-19. This tax was again effectively coercive for those not exempt, for the same reasons as the Virginia bill. Moreover, the Maryland bill was not rejected because it was an establishment of religion, since Maryland maintained a religious establishment throughout this period. Christianity was declared the official state religion, public office was limited to Christians, and the constitutional protection for religious liberty was limited to "all persons professing the Christian religion." *First Freedoms* at 153-54, 157-58. The legislature also continued to exercise organizational control in minute detail over the Anglican church. *Id.* at 153-54. Indeed, for many years after the assessment bill was rejected, the state constitution retained a provision empowering the legislature to "lay a general and equal tax for the support of the Christian religion." *Id.* at 154, 157.

²¹ Respondent's *amici* believes the coercion of religious choice could not be the vice at which the Establishment Clause is targeted because such a conclusion would leave no "independent meaning" to the Clause. American Jewish Cong. Br. at 9. Such an argument creates an artificial distinction, for both of the Religion Clauses seek to preserve religious choice from interference by government power, proceeding from a common fundamental philosophical premise that such interference is beyond the jurisdiction of civil government. See Pet. Br. at 14-18.

(Continued on following page)

establish that the secularizing results of their "no-endorsement" test could have been a serious goal of the Framers, and so be the animating principle of the Establishment Clause.²² As demonstrated in our opening submission, the architects of our tradition of religious liberty premised their cause on explicitly religious philosophical principles, arguing that the reforms they sought were Divinely inspired. Pet. Br. at 14-22, 30-34. That they did

without hesitation or embarrassment, underscores the pervasiveness of religious values and assumptions in the thinking of that time and hence the

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Applications of the Free Exercise and Establishment Clauses may overlap, but they are directed at different types of government action, the first a government prohibition of religious belief or practice, the second the exercise of government power in favor of a religious belief. For example, an ordinance prohibiting all religions from owning property would be a burden on the free exercise of religion; a religiously-motivated statute bestowing direct financial aid only to religions would be an impermissible establishment of religion; and a regulation making members of only one religious denomination or sect eligible for a government benefit would be both. Moreover, even a neutral law prohibiting religious practice implicates free exercise rights, but raises no establishment concerns.

²² Respondent tries to tease such an expansive, secular goal out of the Establishment Clause by arguing that the word "respecting" means the Clause was designed to address any action touching religion. See Resp. Br. at 39-40. But the word "respecting" was used in the Clause to prohibit the federal government from enacting laws "respecting" or "concerning" the many state establishments existing at the time, as well as to prohibit it from creating its own establishment. See R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 5, 9, 12-15, 49, 127 (1982); M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 4, 9-15 (1978); Note, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U. L. Rev. 645, 651-53; Kruse, *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 Washburn L.J. 65, 85, 89 (1962). Even the use of the word "touching," as proposed by Rep. Livermore, did not embrace a secularizing goal, but, consistent with Livermore's anti-Federalist views, was designed to bar federal power from affecting state establishments. See *id.*

unlikelihood that citizens of that generation could have viewed a secular political culture purged of religious content as a live alternative.

Separation at 969.

In the historical circumstances of the Framers, the coercive power of the state was able to constrain religious liberty due to the institutional integration of church and state. "[G]overnments controlled or directly intervened in the internal affairs of churches, and churches claimed and were formally endowed with governmental powers."²³ By undoing this institutional integration, the Framers freed religious choice from the specter of government's coercive powers. Thus, faithful application of the Framers' disestablishment decision, and of the rule of law they intended to embody in the Establishment Clause, yields the conclusion that the First Amendment can be violated only by the governmental coercion of religious choice, whether directly or indirectly, but not by the expression of religious values in our civic life.

II. NO ONE'S RELIGIOUS BELIEFS WERE SUBJECTED TO GOVERNMENT COERCION DURING THE GRADUATION CEREMONY.

Respondent claims that we have employed a "limited definition of coercion," failing to appreciate "the subtle pressures . . . in the school setting." Resp. Br. at 10. Quite the contrary, in our opening brief, we recognized the importance of sensitivity to subtle forms of coercion. Pet. Br. at 36; see also *Allegheny County*, 492 U.S. at 659-60 (Kennedy, J., concurring in the judgment in part and dissenting in part). In that brief, Pet. Br. at 39-44, we went on to point out that the *classroom* setting, due to compulsory attendance,²⁴ the role of the teacher

²³ *Id.* at 963.

²⁴ Once it is determined that attendance at a public event is not compulsory, as was the case here, the coercion inquiry logically is at an end. See Pet. Br. at 39-41. Even if attendance is compulsory, the other features of the event, as in the graduation exercises here, may nevertheless lead to the conclusion that no coercion, even indirect, of religious choice is evident. See Pet. Br. at 41-44.

as an authority figure, and the fundamental pedagogical premise of the environment, may render young students "susceptible to unwilling religious indoctrination." *Wallace v. Jaffree*, 472 U.S. 38, 81 (1985) (O'Connor, J., concurring in the judgment). See also *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) ("The State exerts great authority and coercive power through mandatory attendance requirements . . .").

While underscoring the supposed importance for Establishment Clause analysis of some generic "public school setting," Respondent seeks to depreciate the precise attributes of the actual setting of the graduation invocation and benediction here, Resp. Br. at 28-30, attributes which reveal these graduation exercises to be a "noncoercive setting" devoid of those elements of subtle coercion that have been of concern to this Court in the past.²⁵ As this Court put it recently, "there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved." *Board of Educ. v. Mergens*, 110 S. Ct. at 2372. Respondent simply overlooks the complete absence in the graduation setting of those facts that make the classroom so distinctive for Establishment Clause analysis. See, e.g., *Abington School Dist. v. Schempp*, *supra* (Bible readings part of prescribed curriculum; conducted under supervision of teachers; children may be excused during reading); *Engel v. Vitale*, *supra* (state-drafted school prayer).

The graduation ceremonies at issue here are not held during class; they are not necessarily even held at a public

²⁵ The "heightened vigilance" in all this Court's cases applying the Establishment Clause in the public school context arises from coercive features, intrinsic to the classroom, such as mandatory attendance requirements and the like. Yet Respondent has embraced the very passages from *Wallace* and *Edwards* (quoted in text) that make this apparent, ignoring the obvious point of the Court's analysis. See Resp. Br. at 14-16. Indeed, where mandatory attendance requirements are not involved in a public school setting, this Court has found no Establishment Clause violation. *Widmar v. Vincent*, 454 U.S. 263 (1981); *Board of Educ. v. Mergens*, 110 S. Ct. 2356 (1990).

school. J.A. 12-17. Students choose to be present; the ceremony is short, occurs only once in a student's career, and does not involve teaching; and virtually all of the students who choose to attend are in the company of their parents.²⁶

Thus, the potentially coercive aspects of the classroom setting are not present at graduation exercises.²⁷ As for the importance of the occasion and the other attributes noted by Respondent, Resp. Br. at 28-30, they simply do not distinguish a public school graduation ceremony from many other civic ceremonies. If the desire of Respondent to attend his daughter's graduation requires the censorship of Rabbi Guttman's prayers here, surely George Bush should have been barred at his inaugural from making a prayer his "first act as President."²⁸

Respondent's complaint, after all, is that he "is opposed to and offended by the inclusion of prayer in the public school graduation ceremony." J.A. 5. He does not contend that he or his daughter were subjected to unwanted efforts at indoctrination in Judaism, that they were penalized for not subscribing

²⁶ It is precisely these kinds of characteristics that have led lower courts to conclude that a graduation ceremony is quite different from "a classroom setting, where the prospect of subtle official and peer coercion warrants stricter separation of the state from things religious." *Jones v. Clear Creek Indep. School Dist.*, 930 F.2d 416, 422 (5th Cir. 1991). See *Albright v. Board of Educ.*, No. 90-C-639G, slip op. at 16 (D. Utah May 15, 1991) (secondary school graduation invocations and benedictions delivered in "voluntary and non-coercive circumstances"); Pet. Br. at 42 & n.4.

²⁷ Obviously aware of this distinction, Respondent is reduced to a transparent exaggeration to link graduation with normal classroom activities, arguing that "[p]romotional and graduation ceremonies are as integral to a child's school career as is daily class attendance." Resp. Br. at 16.

²⁸ George Bush, Inaugural Address, January 20 1989 in *Inaugural Addresses of the Presidents of the United States from George Washington, 1789 to George Bush, 1989* at 346 (Bicentennial ed. 1989).

to Rabbi Gutterman's expression of religious values, or even that they were subject to pressure, ostracism, or embarrassment as a result of their views of the rabbi's prayers. J.A. 2-7 (Complaint); J.A. 10-19, 24 (Agreed Statement of Facts). Nor do the facts here reveal the indirect coercion that can result from compelling a student to attend class and to opt out of a classroom religious activity. "No one was compelled to observe or participate in any religious ceremony or activity." *Allegheny County*, 492 U.S. at 664 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Respondent has simply been unable to point to any feature of the graduation invocation and benediction here that poses a "realistic risk" that these prayers "represent an effort to proselytize or are otherwise the first step down the road to an establishment of religion." *Id.* Failing to employ governmental power to directly or indirectly coerce the religious choice of the graduating students, Rabbi Gutterman's invocation and benediction did not violate the Establishment Clause.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT E. LEE, INDIVIDUALLY AND AS PRINCIPAL OF
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v.

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether government accommodation of religion in civic life violates the Establishment Clause, absent some form of government coercion.

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INTEREST OF THE UNITED STATES

The School Committee of Providence, Rhode Island, has for many years permitted principals to include invocations and benedictions in the city's junior high and high school graduation ceremonies. The courts below held that this practice violates the Establishment Clause of the First Amendment, as applied to the States through the Fourteenth Amendment.

The United States has a significant interest in this case. The United States is authorized to operate primary and secondary schools for military and foreign service dependents under certain circumstances (10 U.S.C. 7204 (Navy); 20 U.S.C. 241 (federal property); 20 U.S.C. 926 (Defense Department); 22 U.S.C. 2701 (foreign service); and for Native Americans (25 U.S.C. 271-304b)). The resolution of this case will bear directly on the operation of these schools.

In addition, the United States conducts numerous public ceremonies in which religion is acknowledged in some manner. Many of these ceremonies—presidential inaugurations, for example—date back to the founding of the Republic. These traditions, which the United States has a profound interest in preserving, could be called into question under the broader implications of the decisions below.

The United States has participated as a party or as amicus curiae in numerous cases arising under the Establishment and Free Exercise Clauses, most recently in *Board of Education v. Mergens*, 110 S. Ct. 2356 (1990), and *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989). See also briefs amicus curiae filed in *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Sloan v. Lemon*, 413 U.S. 825 (1973); and *Lemon v. Kurtzman*, 403 U.S. 602 (1971); and briefs filed as a party in *United States v. Lee*, 455 U.S. 252 (1982), and *Tilton v. Richardson*, 403 U.S. 672 (1971).

STATEMENT

1. Each year, junior and senior high schools in Providence, Rhode Island, hold graduation ceremonies for students and their families. For many years, it has been the custom to invite local members of the clergy to deliver invocations and benedictions at these ceremonies. In advance of the ceremonies, clergy members are provided by the school system with a pamphlet entitled "Guidelines for Civic Occasions" prepared by the National Conference of Christians and Jews. The guidelines recommend that the prayers for such nonsectarian occasions be composed with "inclusiveness and sensitivity." Pet. App. 19a.

This case arose as a result of the June 1989 graduation ceremony conducted at one of the city's junior high schools, the Nathan Bishop Middle School.¹ As in years past, the ceremony took place at the school, and in the course of the ceremony a member of the clergy—on this occasion Rabbi Leslie Gutterman of Temple Beth El of Providence—delivered an invocation and a benediction. Rabbi Gutterman's invocation and benediction both referred to God. Pet. App. 19a-20a & nn. 2-3.

Respondent's daughter, Deborah Weisman, was among the graduating students who attended Nathan Bishop's 1989 ceremony. She is now attending the city's Classical High School. Pet. App. 20a-21a.

2. Daniel Weisman sued petitioners in district court, alleging that the inclusion of invocations and benedictions in graduation ceremonies at the city's public junior high and high school graduation ceremonies violated the Establishment Clause of the First Amendment as applied to the States through the Fourteenth Amendment. The district court entered judgment in favor of Weisman on the basis of stipulated facts and issued a permanent injunction "enjoin[ing] [petitioners] from authorizing or encouraging the use of prayer in connection with school graduation or promotion exercises." Pet. App. 31a.²

Reviewing the challenged practice under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court determined

¹ Like the city's other public school graduation ceremonies, the Nathan Bishop Middle School ceremony was sponsored by the Providence School Committee and the superintendent of the Providence School Department. The Committee and Superintendent generally leave the planning of each school's ceremony to the school principal, and they permit, but do not require, the ceremonies to include invocations and benedictions. It is the Assistant Superintendent of Schools who provides principals with the "Guidelines for Civic Occasions" pamphlet. Pet. App. 19a-20a; see also Agreed Statement of Facts 3-4, 9-11, reproduced in Br. in Opp. App. A2-A4, A8-A10.

² The court had previously refused to issue a temporary restraining order preventing the inclusion of an invocation and benediction at Nathan Bishop's 1989 graduation ceremony. Pet. App. 19a-20a.

that it failed the "second prong of the *Lemon* [analysis]." Pet. App. 23a. In the court's view, inclusion of a benediction and invocation at graduation ceremonies had the impermissible effect of advancing religion in two ways. First, it "present[ed] a 'symbolic union' of the state and schools with religion and religious practices." *Id.* at 24a. Second, it "convey[ed] a tacit preference for some religions, or for religion in general over no religion at all." *Id.* at 25a. The court viewed its determination that ceremonial invocations and benedictions impermissibly endorse religion as "a foregone conclusion; that is, the reference to a deity necessarily implicates religion." *Ibid.*³

The court refused to follow *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987). In *Stein*, the Sixth Circuit held that invocations and benedictions in public school graduation ceremonies are not per se unconstitutional. The *Stein* court had relied upon *Marsh v. Chambers*, 463 U.S. 783 (1983), in which this Court upheld against an Establishment Clause challenge the Nebraska legislature's practice of opening each day's session with a prayer offered by a paid chaplain. The district court here rejected the approach in *Stein*, concluding that the "*Marsh* holding was narrowly limited to the unique situation of legislative prayer" and thus did not apply to similar religious references at graduation ceremonies. Pet. App. 27a. The court concluded by indicating that invocations and benedictions would be acceptable, but only if they omitted any reference to a deity. *Id.* at 28a-29a.

3. A divided panel of the First Circuit affirmed. Pet. App. 1a-17a. Writing for the majority, Judge Torruella found nothing to add to the "sound and pellucid opinion of the district court." *Id.* at 2a.

³ The court found it unnecessary to decide under *Lemon* whether the practice challenged here had a secular purpose and avoided excessive entanglement between government and religion. See Pet. App. 23a.

Judge Bownes concurred. Pet. App. 3a-13a. Writing separately, he concluded that the ceremonial invocations and benedictions were impermissible under each part of the three-part *Lemon* analysis. Pet. App. 9a-10a. Like the district court, Judge Bownes dismissed this Court's decision in *Marsh* as inapposite. *Marsh*, according to Judge Bownes, "was based on the 'unique' and specific historical argument that the framers did not find legislative prayers offensive to the Constitution because the First Congress approved of legislative prayers." *Id.* at 11a. *Marsh* did not apply here "since free public schools were virtually nonexistent at the time the Constitution was adopted." Pet. App. 11a (quoting *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987)). Unlike the district court, Judge Bownes did not believe that public ceremonial invocations and benedictions would be permissible if they omitted any reference to a deity. Invocations and benedictions, in his view, "are by their very terms prayers and religious." Pet. App. 13a.

Judge Campbell dissented from what he considered "the[] extreme views of [his] colleague[s]." Pet. App. 14a. He did not believe that the Constitution prohibits "message[s] * * * especially suitable for a rite of passage like a graduation, where those present wish to give deeply felt thanks." *Ibid.* Instead, he found that "*Marsh* and *Stein* provide a reasonable basis for a rule allowing invocations and benedictions on public, ceremonial occasions," so long as school authorities invited speakers representing a wide range of religious beliefs and ethical philosophies. *Id.* at 16a.

SUMMARY OF ARGUMENT

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court formulated a three-part inquiry to assess an Establishment Clause challenge to government programs providing financial aid to sectarian institutions. Since then, the Court has applied the *Lemon* "test" outside of the context in which it was fashioned. The test has come to

be used, *inter alia*, to assess Establishment Clause challenges to civic acknowledgments of our religious heritage in public life. The result has been pervasive confusion in the lower courts and persistent division on this Court.

The Court has not, however, invariably hewn to the *Lemon* formula. The Court avoided reliance on *Lemon* in *Marsh v. Chambers*, 463 U.S. 783 (1983), where the Court upheld daily prayer in a state legislature, based on similar traditions reaching back to the framing of the Constitution. On other occasions, the Court has warned against overreliance on *Lemon* in this "sensitive area." *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984). Indeed, a majority of the members of this Court, recognizing the confusion that *Lemon* has spawned, has on separate occasions advocated significant revision or abandonment of the *Lemon* test.⁴

This case offers the Court the opportunity to replace the *Lemon* test with the more general principle implicit in the traditions relied upon in *Marsh* and explicit in the history of the Establishment Clause. That principle focuses on the overriding concern of the Religion Clauses—the assurance of religious liberty—and holds that civic

⁴ E.g., *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment and dissenting in part) ("Substantial revision of our Establishment Clause doctrine may be in order."); *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("pessimistic evaluation * * * of the totality of *Lemon* is particularly applicable to the 'purpose' prong"); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, C.J., dissenting) (*Lemon* test is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, [and] is difficult to apply and yields unprincipled results"); *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting) (expressing "doubts about the entanglement test" of *Lemon*); *Roemer v. Board of Public Works*, 426 U.S. 736, 768 (1976) (White, J., concurring in judgment) ("I am no more reconciled now to *Lemon I* than I was when it was decided. * * * The threefold test of *Lemon I* imposes unnecessary, and * * * superfluous tests for establishing [a First Amendment violation].").

acknowledgments of religion in public life do not offend the Establishment Clause, as long as they neither threaten the establishment of an official religion nor coerce participation in religious activities.

This liberty-focused principle recognizes that, in the early years of the Republic, all three branches of government welcomed devotional exercises to inaugurate their official business. The Founding Fathers encouraged this practice; they saw no inconsistency between ceremonial acknowledgments of the country's religious heritage and the Establishment Clause. Indeed, the Constitution they framed permits acknowledgment of religion as an inherent part of the ceremony that lies at the heart of the civic life of the Republic. The Oath Clauses contemplate that officials of the United States and of the several States may undertake an inherently religious act—swearing an oath—when they pledge to uphold the laws and Constitution of the United States. U.S. Const. Art. II, § 1, Cl. 8; Art. VI, Cl. 3. As these provisions and other historical evidence show, the practice of the early Republic cannot be dismissed as a desultory gesture undertaken without attention to constitutional theory. A proper theory of the Establishment Clause must therefore embrace the validity of this practice and its modern counterparts, rather than treating them as anomalies. The proper approach recognizes that in this setting coercion is the touchstone of an Establishment Clause violation.

This approach accords with the language and history of the Establishment Clause. As its text makes plain, the Establishment Clause was adopted to prevent the establishment of an official religion. Established religions were the rule in the Old World; they were established and maintained through laws that compelled payment of taxes and obedience to the tenets of the favored church. The Framers who adopted the Establishment Clause plainly did not consider civic participation in ceremonial acknowledgments as abridging religious liberty or threatening to establish an official religion.

The Framers who sanctioned civic acknowledgment of religion on occasions momentous to the Nation—such as presidential inaugurations, sessions of Congress, and sessions of this Court—can hardly have intended to bar it on more mundane occasions, such as public school graduations. Yet such a two-tiered system is nonetheless developing from the effort to follow both the approach in *Marsh* and the *Lemon* test. The tension can be resolved, and coherence in this area restored, by an approach that focuses on whether religious liberty is implicated by the challenged practice.

Under such a liberty-focused principle, the practice challenged in this case should be sustained. We recognize that consideration whether a particular practice infringes upon religious liberty should be undertaken with especial care when the practice occurs in the classroom setting. No level of heightened scrutiny, however, should be triggered merely because a challenge involves a ceremony that children might attend. The graduation setting at issue here differs markedly from the classroom setting. In the classroom, the school carries out an avowedly instructional mission, and school officials are the sole authority figures. Graduations, in contrast, are ceremonial affairs, and the parents themselves are present to act as a natural bulwark against risk of official coercion. Because graduations are designed not only for students but also for their families and friends, the graduation setting does not warrant an approach different from that applied in other ceremonial settings. Children may well be present when invocations and benedictions are delivered at inaugurations and similar state ceremonies. Those religious acknowledgments often will be similar to those typically delivered at graduations. It would make no sense to hold that this Court could open its sessions with an invocation of the Deity that could not be delivered at a public school graduation.

ARGUMENT

1. Nothing in the text of the Establishment Clause or in the concerns leading to its adoption suggests that a ceremonial acknowledgment of religion is a “law respecting an establishment of religion.” On the contrary, history shows that religious acknowledgments were part of the ceremonies of all three branches of government when the Republic was founded. Indeed, “[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.” *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). The Founders encouraged civic recognition of the Nation’s religious heritage; they did not believe that the practice threatened religious liberty by establishing an official religion or coercing participation in religious activities. It therefore did not implicate the prohibition embodied in the Establishment Clause.

a. In the early Republic, all three branches of government included religious acknowledgments on ceremonial occasions. “[H]istory is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders.” *Lynch v. Donnelly*, 465 U.S. at 675. That history is particularly telling since the government of the new Republic was dominated by the Founders. See *Marsh*, 463 U.S. at 790 (citing *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)).⁵

The early Presidents all included invocations of God in their inaugural addresses. Those invocations have previously been reproduced in decisions of this Court and therefore need not be reiterated in their entirety here. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring

⁵ See also *Myers v. United States*, 272 U.S. 52, 174-175 (1926) (the First Congress “was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument”).

in the judgment and dissenting in part); *Engel v. Vitale*, 370 U.S. 421, 446 n.3 (1962) (Stewart, J., dissenting). It is useful to note, however, that Thomas Jefferson—often cited as an advocate of strict separation between church and state (and author of the decidedly extratextual “wall of separation” metaphor)—explicitly invoked divine blessing in his second inaugural address.⁶ In addition, Presidents Washington, Adams, and Madison all issued proclamations recommending prayers of

⁶ On March 4, 1805, President Jefferson ended his second inaugural address as follows:

I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessities and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, guide their councils, and prosper their measure that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations.

1 *Messages and Papers of the Presidents, 1789-1897* at 382 (J. Richardson ed. 1897). This is not the only evidence that casts doubt on latter-day characterizations of Jefferson as a strict separationist. Further evidence is supplied by his approval of treaties sending ministers to the Indians. See R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 261-270 (1982). In addition, when Jefferson participated in revising Virginia's legal code, he sponsored or drafted a number of bills that demonstrated a much greater willingness to accommodate religion in public life than is suggested by the single piece of state legislation for which he is generally known, the Bill for Establishing Religious Freedom. See generally Dreisbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations*, 69 N.C.L. Rev. 159 (1990); Adams & Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1585-1586 (1989). Indeed, much of Jefferson's concerns about the national government's involvement in religion stemmed from his deep-seated conviction that the role of the central government should be limited as a general matter, reserving to the States matters that might touch on the sphere of religion.

thanksgiving. *Lynch*, 465 U.S. at 675 & n.2.; see also 1 *Messages and Papers of the Presidents, 1789-1897*, at 64, 268-270, 284-286, 513, 532-533, 559 & 560-561 (J. Richardson ed. 1897); 3 A. Stokes, *Church and State in the United States* 180-193 (1950).

The early Congresses likewise encouraged acknowledgments of religious heritage both within and without their halls. Prior to adoption of the Constitution, the Continental Congress opened its sessions with a prayer offered by a paid chaplain. See *Marsh*, 463 U.S. at 787. After the Framing, and “[i]n the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid Chaplains for the House and Senate.” *Lynch*, 465 U.S. at 674.⁷ The First Congress also requested that the President recommend to the people a day of prayer. 1 *Annals of Cong.* 949-950 (J. Gales ed. 1789).

Nor was the federal judiciary out of step with its coordinate branches in this respect. To the contrary, the Article III branch early on adopted a tradition of ceremonial acknowledgment of religion. Contemporary reports show that the phrase “God Save this Honorable Court” became part of the traditional opening of the Court's sessions at least as early as the Court of Chief Justice Marshall. C. Warren, *The Supreme Court in United States History* 469 (1922). Still earlier, the first Chief Justice, John Jay, invited members of the clergy to open sessions of the circuit court held in New England with a prayer. Letter of John Jay to Richard Law (Mar. 10, 1790), reprinted in 2 *The Documentary History of the Supreme Court of the United States: The Justices on Circuit, 1789-1800*, at 13-14 (M. Marcus ed. 1988). Thereafter, clergymen delivered prayers during circuit

⁷ One of the Congressmen appointed to draft the legislation providing for chaplains to be paid was James Madison, who, like Jefferson, is often mentioned as a champion of absolute separation between government and religion. *Marsh*, 463 U.S. at 788 n.8.

court on a regular basis, including on one occasion when the Vice President was in attendance, see 2 *The Documentary History of the Supreme Court of the United States: The Justices on Circuit, 1790-1794*, at 276-277 (M. Marcus ed. 1988) (quoting article in *Columbian Centinel* (Boston), May 16, 1792), and on several occasions in Providence, Rhode Island, see *id.* at 496 (reprinting article of Nov. 8, 1794, in the *Providence Gazette*).

These ceremonial acknowledgments were so pervasive among the three branches that it is fair to say they constituted a regular practice of our early government. It would be modern-day arrogance in the extreme to dismiss that practice as the result of unthinking prejudice or political expedience on the part of the Founding generation. To the contrary, the Framers' approval of acknowledgments of the country's religious heritage was the product of deliberate reflection on the relation between religion and civic life. The Framers were aware that the country had been founded by "settlers [who] came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches," *Everson v. Board of Education*, 330 U.S. 1, 8 (1947), and were acutely concerned to avoid such persecution in the new republic. See also *Edwards v. Aguillard*, 482 U.S. 578, 605 (1987) (Powell, J., concurring) ("The early settlers came to this country from Europe to escape religious persecution that took the form of forced support of state-established churches."). The Framers simply did not regard acknowledgment of religion on ceremonial occasions as presenting the sort of dangers they determined to avoid by adopting the Establishment Clause.⁸ What is abundantly clear is that the distinctly latter-day claim of "sanitized separation between Church and State," *Committee for Public Educa-*

⁸ See also Northwest Ordinance of 1787, Art. III ("Religion, morality, and knowledge being necessary to good government, schools and means of education shall ever be encouraged."), re-enacted as Northwest Ordinance of 1789, ch. 8, § 1, 1 Stat. 50, 52.

tion & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973), was alien to the Founding generation's vision of the Establishment Clause. That Clause was designed, above all, to protect religious liberty, not to expunge religion from the Nation's official life.

b. The Framers made explicit in the Constitution their belief that acknowledgment of religious devotion was entirely consistent with the civic order provided for in that document. The Oath Clauses approve of the Nation's leaders publicly undertaking a religious duty when they undertake the most solemn constitutional duty—pledging fidelity to the laws and Constitution of the Republic.⁹

The term "oath," as used in these clauses, referred to the invocation of God as a witness to the expression of an obligation: in short, a sacred vow.¹⁰ In discussing

⁹ Article II, § 1, Cl. 8, declares:

Before he enters on the Execution of his Office, [the President] shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Article VI, Cl. 3, declares:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

¹⁰ See D. Walker, *The Oxford Companion to Law* 896 (1980) (oath is "[a]n assertion or promise made in the belief that supernatural retribution will fall on the taker if he violates what he swears to do. The custom of an oath as sacred and binding is ancient and widespread."); A. English, *A Dictionary of Words and Phrases Used in Ancient and Modern Law* 579 (1899) (oath is an "assurance by appeal to God, that a statement is true"); 2 S. Johnson, *A Dictionary of the English Language* (1755) (oath is "[a]n affirmation, negation, or promise, corroborated by the attesta-

the Article VI Oath Clause at North Carolina's ratifying convention, James Iredell, later a Justice on this Court, defined an oath as a "solemn appeal to the Supreme Being for the truth of what is said by a person who believes in the existence of a Supreme Being and in a future state of rewards and punishments, according to that form which will bind his conscience most." 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 196 (J. Elliot 2d ed. 1836).¹¹ George Washington's actions at the first inauguration confirm that compliance with the Oath Clauses occasioned acts of religious significance at civic ceremonies. When Chancellor Robert Livingston requested Washington to take the prescribed oath of office, Washington responded as follows (6 D.S. Freeman, *George Washington* 192 (1954)):

"I solemnly swear" Washington answered and repeated the oath. Reverently he added, "So help me God." He bent forward as he spoke and before Otis could lift the Bible to his lips, he kissed the book.¹¹²¹

tion of the Divine Being"); T. Blount, *Nomo-Lexicon: A Law-Dictionary* (1670) ("Oath (*Juramentum*) is a calling Almighty God to witness that the Testimony is True; * * * a Holy Band, a sacred Tye, or Godly Vow.").

¹¹ At the time of the Framing, it was similarly understood that oaths before the court imposed a religious duty as well as a civic duty. Chief Justice John Jay, while riding circuit, instructed jurors that witnesses were to swear their oaths under "those solemn obligations which an appeal to the God of Truth impose." As for the jurors themselves, Chief Justice Jay said, "[Y]our Oath superadds new and solemn Obligations to those which result from the Laws of Morality." *John Jay's Charge to the Grand Jury of the Circuit Court for the District of Vermont* (June 25, 1792), reprinted in 2 *The Documentary History of the Supreme Court of the United States: The Justices on Circuit, 1790-1794*, at 284, 285 (M. Marcus ed. 1988).

¹² The Oath Clauses also reflect the Framers' dedication to freedom of conscience and the corresponding need for civic accommodation of varying beliefs. The Oath Clauses provide that office holders may bind themselves by affirmation rather than oath. This option was afforded not for the irreligious who might not accept

c. As its text makes plain, the purpose of the Establishment Clause is to prohibit the establishment of an official religion. History shows that the Clause was adopted to guard against establishments of religion of the sort that prevailed in Great Britain and throughout Europe and that caused many to flee to this country. Religions were established in the Old World through laws that compelled both payment of taxes to support the favored religion and obedience to that religion's tenets.¹³ Because force and funds were the twin evils that animated the drafters of the Establishment Clause, it should come as no surprise that these same drafters deemed ceremonial acknowledgments of religion, which posed no such dangers to religious liberty, to be fully compatible with the Constitution.

the religious significance of an oath, but for those whose religious scruples precluded such a solemn invocation for worldly ends. Adams & Emmerich, *supra*, 137 U. Pa. L. Rev. at 1630-1633; J. Story, *Commentaries on the Constitution* § 1838, at 703 (1985 reprint of 1833 ed.) (Oath Clause of Article VI "permitted a solemn affirmation to be made instead of an oath" because some denominations were "conscientiously scrupulous of taking oaths"). The provision permitting an affirmation in lieu of an oath was no doubt drawn from similar provisions in state constitutions, many of which explicitly included such a provision to accommodate religious beliefs. The Maryland Constitution of 1776, for example, provided:

That the manner of administering an oath to any person, ought to be such, as those of the religious persuasion, profession, or denomination of which such person is one, generally esteem the most effectual confirmation, by the attestation of the Divine Being. And that the people called Quakers, those called Dunkers, and those called Menonists, holding it unlawful to take an oath on any occasion, ought to be allowed to take their solemn affirmation * * *.

Md. Const. of 1776, Declaration of Rights, Art. XXXVI, quoted in Adams & Emmerich, *supra*, 137 U. Pa. L. Rev. at 1631.

¹³ *Edwards v. Aguillard*, 482 U.S. at 605 (Powell, J., concurring); *Everson v. Board of Education*, 330 U.S. at 8; L. Levy, *The Establishment Clause* 4-8 (1986); Adams & Emmerich, *supra*, 137 U. Pa. L. Rev. at 1620-1622.

In examining the history of the Establishment Clause, this Court has relied on historical evidence concerning the views of Madison and Jefferson. See, e.g., *Edwards v. Aguillard*, 482 U.S. at 605-606 (Powell, J., concurring); *Engel v. Vitale*, 370 U.S. 421, 428, 431-432 nn. 13-16, 436 n.22 (1962); *Everson v. Board of Education*, 330 U.S. at 12, 33-34.¹⁴ In particular, the Court has focused on their roles in the struggle for religious freedom in Virginia, which occurred over the decade that preceded adoption of the Constitution. See, e.g., *Edwards v. Aguillard*, 482 U.S. at 606 (Powell, J., concurring).¹⁵ This evidence shows that compelled taxation and forced religious observance were the dangers to religious liberty that the Establishment Clause was intended to avert.

The culmination of Madison's efforts in Virginia was his Memorial and Remonstrance against Religious Assessments. See *Everson v. Board of Education*, 330 U.S. at 63-72 (reproducing Madison's Memorial and Remonstrance). Madison drafted the Memorial and Remonstrance to oppose a legislative proposal to tax all Virginia citizens to support teachers of the Christian religion. *Edwards v. Aguillard*, 482 U.S. at 606 (Powell, J., concurring). See generally L. Levy, *The Establishment Clause* 55-58, 101-104 (1986). In Madison's own words, the document was founded on the fear that the proposed bill would be a "dangerous abuse of power" if "armed with the sanc-

¹⁴ But see *Wallace v. Jaffree*, 472 U.S. at 92 (Rehnquist, J., dissenting) ("Thomas Jefferson was of course in France at the time the constitutional amendments known as the Bill of Rights were passed by Congress and ratified by the States. * * * He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.").

¹⁵ See generally Dreisbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations*, 69 N.C.L. Rev. 159, 173 nn. 77-78 (1990); Comment, *The Supreme Court, The First Amendment and Religion in the Public Schools*, 63 Colum. L. Rev. 73, 79 (1963).

tions of a law." 8 *The Papers of James Madison* 298 (1973) (Memorial and Remonstrance). Setting forth reasons for opposing the bill, Madison emphasized its coercive aspect. For example, the first reason advanced by Madison was that the bill violated

the fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence."

Id. para. 1 (emphasis added). "[C]ompulsive support" of religion, he stated, is "unnecessary and unwarrantable." *Id.* para. 3. He also warned that "attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general." *Id.* para. 3. In sum, Madison identified a law that established religion as one that coerced support of, or participation in the tenets of, a particular religion.¹⁶ These—not acknowledgments of our religious heritage—represented the threats to religious liberty against which both the Establishment Clause and the Free Exercise Clause were aimed.

So it was that, in the wake of the Memorial and Remonstrance, the bill for supporting teachers of Christianity was defeated. L. Levy, *supra*, at 58; Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L. Rev. 839, 854 (1986). In its place, Virginia enacted Jefferson's Act for Establishing Religious Freedom. The central injunction in Jefferson's leg-

¹⁶ In the Memorial and Remonstrance, Madison refers to the "establishment proposed by the bill", its "ecclesiastical establishment," and the "proposed establishment." Similarly, in a letter to James Monroe regarding the bill, Madison entitled it the "Bill for Establishing the Christian Religion in this State." Letter of James Madison to James Monroe (June 21, 1785), 8 *The Papers of James Madison* 306 (1973), quoted in L. Levy, *supra*, at 102. The bill itself was entitled "A Bill Establishing a Provision for Teachers of the Christian Religion." See *Everson v. Board of Education*, 330 U.S. at 72-74 (supplemental appendix).

isolation echoed the "fundamental truth" on which Madison's Memorial and Remonstrance was based:

[T]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

12 Hening's Stat. 86 (W. Hening ed. 1823). From these words it seems clear that to Jefferson, like Madison, the essence of an establishment of religion was some form of legal coercion that, by its nature, negated religious liberty.

Madison's remarks during congressional debates on the proposed language of the Establishment Clause sound the same theme that he and Jefferson had voiced in Virginia. The congressional debate was reviewed at length in then-Justice Rehnquist's opinion in *Wallace v. Jaffree*, 472 U.S. at 93-99, and we shall not rehearse that history in detail here. But this much is clear and powerfully on point: Madison stated that the proposed provision meant that "Congress should not establish a religion, and *enforce* the legal observation of it by law, nor *compel* men to worship God in any manner contrary to their conscience." *Id.* at 95 (quoting 1 Annals of Cong. 730) (J. Gales ed. 1789) (emphases added). In identifying the concerns prompting the Clause, Madison said that "the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would *compel* others to conform." 472 U.S. at 96 (quoting 1 Annals of Cong. 731 (J. Gales ed. 1789) (emphasis added)). These, then, were the threats to religious freedom interdicted by the Establishment Clause.

d. This Court has consistently recognized that interpretation of the Establishment Clause must "comport[]

with what history reveals was the contemporaneous understanding of its guarantees." *Lynch*, 465 U.S. at 473.¹⁷ Indeed, the Court's "Establishment Clause precedents have recognized the special relevance in this area of Mr. Justice Holmes' comment that 'a page of history is worth a volume of logic,'" *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. at 777 n.33 (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

As we have explained, history teaches that the Framers intended by the Establishment Clause to prohibit laws that threaten religious liberty by establishing religion or coercing participation in religious activities. The Court should confirm that the principle animating the Establishment Clause is to "forestall[] compulsion by law of the acceptance of any creed or the practice of any form of worship." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).¹⁸

¹⁷ See also *Abington School Dist. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.").

¹⁸ The Court, we submit, should reconsider isolated statements in some later decisions to the effect that "proof of coercion" is "not a necessary element of any claim under the Establishment Clause." *Committee for Public Education v. Nyquist*, 413 U.S. at 786; see also *Abington School Dist. v. Schempp*, 374 U.S. at 222-223. The Court's first such statement was in *Engel v. Vitale*, 370 U.S. at 430 ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion."). That statement was not necessary to the Court's decision in *Engel*, for the Court went on to observe: "This is not to say, of course, that [school prayers] do not involve coercion * * *. When the power, prestige, and financial support is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Id.* at 430-431. Thus, *Engel* is fairly read to support only the limited proposition that proof of "direct * * * compulsion" is not required to demonstrate an Establishment

2. a. As government has expanded since the days of the early Republic and created new public institutions, new public ceremonies have naturally arisen. But these ceremonies nonetheless frequently include the same sort of religious acknowledgments that were approved in the early Republic. Invocations, benedictions, and other references to God are common now, just as they were at the Founding. A proper theory of the Establishment Clause should embrace the validity of these practices in contemporary ceremonial settings as well as in the context of more venerable ceremonies. See *Lynch v. Donnelly*, 465 U.S. at 674-678 (discussing "unbroken history" of religious acknowledgments in public life).

The problem, of course, is not the language or history of the First Amendment. The problem is *Lemon*. That is, rigorous application of *Lemon*'s tripartite test would invalidate ceremonial acknowledgments of religion in both contexts. Yet under *Marsh*, the *Lemon* test appears to have been discarded, at least with respect to religious acknowledgments in ceremonies whose ancestry dates back to the Framing. This state of affairs is breeding a two-tiered approach that threatens to yield inequitable results: a grandfather approach, evidenced by *Marsh*, available to participants in ceremonies specifically approved by the Framers, under which religious acknowledgments will generally be permitted; and the *Lemon* approach for participants in more modern (and arguably less momentous) ceremonies, under which the constitutionality of religious acknowledgments is at best uncertain.

The fact pattern in this case—delivery of an invocation and benediction at a public school graduation—

Clause violation. See generally McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986). At the same time, the decision also suggests that proof of indirect coercion is, at a minimum, highly relevant. For reasons discussed in the text, we believe that in this context proof of some form of coercion is required.

illustrates the point. A court assessing a prayer in a civic setting first faces the threshold inquiry whether to apply *Lemon* or *Marsh*. The court of appeals here (adopting the district court's opinion) chose *Lemon*. Pet. App. 2a, 21a-26a. It reasoned that *Marsh* did not apply because public schools did not exist at the time of the Framing; since invocations in public schools were not a tradition approved in the early Republic, they could not be upheld under *Marsh*. *Id.* at 26a & n.8. In contrast, the court of appeals in *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), chose *Marsh*. The *Stein* court reasoned that the tradition of graduation invocations was sufficiently akin to legislative prayers to be governed by *Marsh*.

This characterization inquiry seems wholly misguided. The Nation's tradition of acknowledging its religious heritage is not a series of discontinuous events at isolated institutions—some old and protected, some new and vulnerable—but a complex tapestry of civic culture, with one strand of tradition naturally leading to another as one institution arises from another. Thus, that there were no prayers at public school graduations at the time of the Framing cannot sensibly dispose of their constitutional validity, any more than the fact that there were no airplanes at the time of the Framing could dispose of a Commerce Clause challenge to state restrictions on air travel.

Under current precedent, once courts select the *Lemon* test, they face another question: whether to apply the test with a historical gloss. To do so accords with the approach of *Lynch*, in which the Court upheld the constitutionality of a public creche display because it had no greater effect of advancing religion than did other religious symbols and practices in the Nation's civic life. 465 U.S. at 668. That avowedly comparative approach may avoid the stark anomalies often produced by an application of *Lemon* that is not informed by history. However, determining whether one practice advances re-

ligion more than another is measuring without an objective ruler.¹⁹ Courts attempting to fashion such a ruler have inevitably devised a theological measure to distinguish, for instance, between a menorah and a creche. See *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989). Thus, the attempt to repair the "effects" prong of the *Lemon* test to take account of history mocks the "entanglement" prong by leading the judiciary into minute scrutiny of the content and context of religious practices.²⁰

The liberty-focused inquiry we suggest properly shifts the focus away from an evaluation of the religious practice to an assessment of the autonomy of the observers of the practice. The approach thereby guides courts away from the treacherous shoals of religious doctrine and symbolism, cf. *County of Allegheny*, 492 U.S. at 665-666 (Kennedy, J., dissenting), to the more familiar judicial shores of liberty, on the one hand, and compulsion and constraint, on the other.²¹ To be sure, the ques-

¹⁹ See Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 Duke L.J. 770, 783-787.

²⁰ Justice O'Connor has suggested replacing the "effects" prong of the *Lemon* test with an inquiry into whether the religious practice or symbol endorses religion. See, e.g., *Lynch*, 465 U.S. at 687-694 (O'Connor, J., concurring). We believe, with all respect, that assessing the degree to which a prayer delivers an impermissible message of endorsement leads to many of the same difficulties as measuring religious "effects." See *Harris v. City of Zion*, 927 F.2d 1401, 1419, 1423 (7th Cir. 1991) (Easterbrook, J., dissenting) ("What is endorsement in a world pervaded by religious imagery, from the eye in the Great Seal of the United States (the eye of God in a pyramid representing the Christian Trinity) to 'In God We Trust' on the coinage to Thanksgiving Day (to whom are thanks being given?) to the religious stamps the Postal Service issues at Christmas and Easter to the names of our cities (Los Angeles, San Francisco, Corpus Christi) and submarines.").

²¹ The issue of coercion is raised in many areas of constitutional law. See, e.g., *Arizona v. Fulminante*, 111 S. Ct. 1246, 1251-1253

tion whether a challenged practice is coercive may not always be easy to answer. The question will not, however, entangle the courts in a divisive and often fruitless assessment of religious doctrine and symbols. In this respect, the liberty-focused inquiry represents a significant advantage over current doctrine.

b. Our suggested approach accords with this Court's longstanding recognition that accommodation by the government of the religious beliefs of its citizens "follows the best of our traditions." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). The Framers contemplated such efforts and encouraged them: "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself." *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970). The Constitution thus provides breathing space between the mandate of the Free Exercise Clause and the prohibition of the Establishment Clause within which government can accommodate religious expression or practice. That is *Marsh's* basic analytic insight.

The spirit of accommodation provided for in the Constitution is as essential to the vitality of civic life today as it was in the early Republic. That spirit should thus not only inform the assessment of religious invocations during inaugurations and sessions of Congress and this Court; it should be honored throughout the broad sphere in which modern government operates—including in institutions that were once wholly or predominantly in the private sector.

This case illustrates the wisdom of this Court's teaching that government's proper role is one of "benevolent neutrality" toward religion, in which "there is room for play in the joints." *Walz v. Tax Commission*, 397 U.S.

(1991) (determining whether a confession was given free of coercion); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (determining whether consent for a search was given free from coercion).

at 669. Parents and children gathered at Nathan Bishop, as millions do throughout the country every year, to celebrate an important rite of passage in modern society—graduation from school. For many, religion has provided the inspiration that guides both parent and child through the inevitable difficulties of adolescence; for many, too, religion provides a framework that gives coherence and meaning to the search for knowledge. For these people, to refuse to acknowledge their beliefs through some brief, symbolic act such as Rabbi Gutterman's invocation and benediction would be to falsify their experience and fundamentally distort the meaning of the ceremony.

3. The demonstrated shortcomings of the *Lemon* test counsel against attempting to reduce analysis under the Establishment Clause to a single, complicated formula. In our view, the precise contours of a liberty-focused inquiry should accordingly be limned through case-by-case adjudication. Nonetheless, we also believe that, when the inquiry is undertaken for the present case, it leads to the conclusion that ceremonial acknowledgments of religion in civic life do not, as a general matter, offend the Establishment Clause.

a. A liberty analysis focuses on the autonomy of the individual who is in a position to perceive the expression. Coercion enters the picture when—in connection with an acknowledgment of religion that by itself is noncoercive—an individual is required to participate in religious activities. That conclusion follows from the principle that “the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

For the same reason, a person cannot be compelled to listen to a religious acknowledgment. That may be inferred from this Court's decision in *Zorach v. Clauson*, *supra*. There, the Court upheld a release-time program,

which permitted students to leave public school to receive religious instruction. *Zorach v. Clauson*, 343 U.S. at 312-314. In so holding, the Court emphasized the fact that students were not compelled to attend the religion classes. *Id.* at 311. Under those circumstances, the program did not exert any coercive influence on the students who chose not to avail themselves of the “released time” program. Instead, it simply “respect[ed] the religious nature of our people and accommodate[d] the public service to their spiritual needs.” *Id.* at 314. Similarly, an individual is not coerced by a civic acknowledgment of religion so long as that person is not required to witness it.²²

A voluntary decision not to witness a civic acknowledgment of religion, however, cannot be considered a response to coercion. Analysis under the Establishment Clause, like similar inquiries under other constitutional provisions, should be guided by common-sense respect for individual free will. Cf. *Schnecko v. Bustamonte*, *supra*. The Framers set an example of common sense in this area. They welcomed legislative prayer and other ceremonial acknowledgments of religion, even though they were undoubtedly aware that individual legislators or others might choose to be absent during them. The Framers' acceptance of ceremonial acknowledgments presupposed some minimal degree of individual tolerance that should govern modern assessments of religious acknowledgments.²³ Viewed in that framework, for ex-

²² While Justice Jackson dissented from the result in *Zorach v. Clauson*, he did so because, in his view, “[the] released time program [was] founded upon a use of the State's power of coercion, which, for [him], determin[e]d its unconstitutionality.” 343 U.S. at 323 (emphasis added).

²³ During discussions at the First Constitutional Convention about whether to open sessions with a prayer, Samuel Adams met objections to such a practice by stating that “he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country.” C. Adams, *Familiar Letters of John Adams and His Wife, Abigail Adams*,

ample, a decision not to be present for a graduation invocation and benediction does not demonstrate the existence of coercion. Under the Free Exercise and Free Speech Clauses, citizens are inevitably exposed to a volley of views that may give offense and that they may choose to ignore. Cf. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72-74 (1983); *Erznoznik v. Jacksonville*, 422 U.S. 205, 208-212 (1975).

Common sense should likewise guide the evaluation of any costs entailed in civic acknowledgments of religion. The expenditure of nominal amounts should not suffice to demonstrate an Establishment Clause violation. Cf. *Lynch*, 465 U.S. at 684 (cost of maintaining creche was *de minimis*). Here, too, history confirms what common sense suggests. Virtually every civic acknowledgment involves some expense—if only, for example, a portion of the salary of the officer who opens this Court's sessions with an invocation. That does not warrant abrogation of the practice. On the other hand, public expressions of the Nation's religious heritage could be sufficiently expensive to implicate the Establishment Clause's prohibition of "substantial taxes to support religious exercises," *Everson v. Board of Education*, 330 U.S. at 11. Cf. *Bowen v. Kendrick*, 487 U.S. 589, 620-622 (1988) (public funds provided to organizations for adolescent family planning services cannot be used for religious activities).

b. We recognize that this Court's Establishment Clause decisions evince a special solicitude for young children. E.g., *Grand Rapids School District v. Ball*, 473 U.S. 373, 383 (1985). Our analysis is compatible with this aspect of the case law in cases involving the classroom setting. In that setting, young children may be susceptible to influences that might be deemed indirectly coercive. Thus,

during the Revolution 37-38 (1964), quoted in *Marsh*, 463 U.S. at 792.

heightened sensitivity may be warranted when evaluating the factors described above.²⁴

In any event, no special rule for children is justified in the setting of a public school graduation or in any other ceremonial setting where children may compose part of the audience. The law generally does not create special rules to protect children from outside influences that their parents or guardians are in a position to counter. See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (invalidating the postal service's regulations on contraceptive advertisements because parents can control access to the mailbox).²⁵

Moreover, a special rule for ceremonies that children might attend would threaten to swallow the general rule. For example, children often witness national events such as inaugurations—if not in person, then through radio or television. That is entirely proper, indeed laudable, for fledgling citizens and future leaders. It is doubtful that an invocation delivered by a local clergyman poses greater risk of coercion than an inaugural address that includes a prayer by the President.

²⁴ But cf. *Engel*, 370 U.S. at 435 n.21, where the Court, while invalidating state-sponsored and officially composed classroom prayer, emphasized that

[t]here is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

²⁵ The Court's Establishment Clause cases reject the notion that students are always susceptible to indoctrination. See *Tilton v. Richardson*, 403 U.S. 672, 686 (1971).

c. The practice challenged here does not have any of the elements of coercion previously identified. Rabbi Gutterman's invocation and benediction for Nathan Bishop's ceremony were plainly mere acknowledgments of a belief in God. Students were not compelled to attend the ceremony, and those who attended were not forced to participate in any religious activity. It is not asserted that any more than a nominal amount of public money was spent on Rabbi Gutterman's portion of the ceremony. Under the analysis that we propose, the practice should be sustained.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ROBERT E. LEE, *et al.*,
Petitioners,
v.

DANIEL WEISMAN, *etc.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF OF THE CLARENDON FOUNDATION
AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS

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**BRIEF OF THE CLARENDON FOUNDATION
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INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of this Court, The Clarendon Foundation respectfully submits this brief amicus curiae in support of Petitioners, Robert E. Lee, *et al.* Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

The Clarendon Foundation is a non-profit, non-partisan legal foundation concerned with significant legal issues

related to the Constitution, democratic government and the attendant rights and responsibilities of citizenship. The Foundation participates in various forums in cases where the resolution of constitutional issues may be aided by philosophical and historical analyses in addition to case law and public policy considerations. The Clarendon Foundation is committed to an on-going review of the basic tenets of our constitutional government, in the spirit of George Mason's admonition that "... no free government, or the blessings of liberty, can be preserved to any people, but . . . by frequent recurrence to fundamental principals." The instant case raises questions of paramount significance to the public interest. We believe the Foundation's perspective will complement Petitioner's brief and assist the Court in the resolution of these issues.

SUMMARY OF ARGUMENT

This case is not merely another school prayer controversy. More fundamentally, it concerns the right of the state to officially acknowledge belief in the existence of a Supreme Being as a central tenet of our constitutional government. The Court is thus presented with the opportunity to provide much needed clarification in one of the most confusing areas of Constitutional jurisprudence, the Establishment Clause of the First Amendment.

The decisions of the lower courts erroneously employed the test of *Lemon v. Kurtzman*. The *Lemon* test requires a "law respecting an establishment of religion." But there is no legislation involved in this case.

Moreover, the lower courts' opinions reflect a fundamental misunderstanding of the historical relationship between church and state and the role of religion in public life envisaged by the Framers of the Constitution. The *Lemon* Court taught that total separation between church and state is not possible in an absolute sense, and that some relationship between government and religious

organizations is inevitable. The lower courts failed to apprehend this essential component in current Establishment Clause analysis.

Although inconsistencies in the lower courts' approaches demonstrate the deficiencies of the *Lemon* test as applied to this case, the teachings of the precedents upon which *Lemon* relied, especially *Walz* and *Zorach*, have not diminished in value. The Court has the opportunity to resolve the judicial confusion surrounding the Establishment Clause by reaffirming the wisdom of these earlier opinions.

Further, the Court has an opportunity to refine the legal doctrines applicable to state-religion interaction where no legislation is at issue, in cases similar to *Marsh v. Chambers*. The Court must reassess the role of religion in public life. There is adequate historical justification for concluding that government has an interest in acknowledging a religious belief in the existence of a Supreme Being. The Bill of Rights itself is a codification of *inalienable* rights—natural rights endowed by a Creator, not by another person or a parchment. Rightly understood, mere reference to a deity at a public school graduation ceremony cannot be actionable under the Constitution.

The Court should formally recognize, as is implicit in its prior decisions, that the objective of separation between church and state (in the absence of legislation) is not inconsistent with mutual interaction so long as the religious activity is non-sectarian in nature and neither the state nor the church in any way intrudes on the sovereignty of the other.

Finally, the Court should declare that the First Amendment is not to be used to promote irreligion. It is ironic, indeed, and misguided, that the Establishment Clause has come to be used as a weapon against religious observance when its very purpose was to protect religious activity from interference by the state.

ARGUMENT

I. THE DISTRICT COURT ERRED IN APPLYING THE ESTABLISHMENT CLAUSE TEST SET OUT IN *LEMON v. KURTZMAN* BECAUSE THIS CASE DOES NOT INVOLVE A "LAW" RESPECTING AN ESTABLISHMENT OF RELIGION.

The conflict among circuit courts concerning the constitutionality of invocations and benedictions at a public school graduation ceremony results from the application of differing standards to those cases. The historical analysis approach of *Marsh v. Chambers*, 463 U.S. 783 (1983), has led the Sixth Circuit and other courts to uphold the constitutionality of such prayers. See *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1409 (6th Cir. 1987). By contrast, the "purpose-effect-entanglement" test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), employed by the lower courts in this case has produced a contrary result.

A. The *Lemon* Test Was Designed For Statutory Construction.

A key to the proper resolution of this case lies in the wording of the First Amendment, wherein the government is prohibited from enacting any "*law* respecting an establishment of religion" (emphasis added). Which of the noted precedents controls depends upon whether the Federal or state government involved has enacted specific legislation respecting religious belief or practice. The express phrasing of the *Lemon* test indicates it was designed for the purpose of statutory construction:

First, the *statute* must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive governmental entanglement with religion." *Walz*

v. State Tax Commission, 397 U.S. 664, 674 (1970)]. . . .

Lemon, 403 U.S. at 612-13 (emphasis added).

The principal precedent relied upon by the Court in *Lemon* recognizes this distinction. In *Zorach v. Clauson*, 343 U.S. 306, 312 (1952), the Court was concerned with public school "release time" programs where students were excused from classes to attend religious instruction or services. The Court observed:

. . . apart from that claim of coercion, we do not see how New York by this type of 'released time' program has made a *law* respecting an establishment of religion within the meaning of the First Amendment.

Zorach, 343 U.S. at 312 (emphasis added).

But there was no such law at force in this case. (The legal predicate for Mr. Weisman's complaint was that the officials who sponsored the graduation ceremony and invited Rabbi Gutterman to participate were acting under color of state law. The misuse of official authority typically denoted by that concept, however, is lacking in this record. There is no evidence that Mr. Weisman or his child felt compelled to acquiesce in the prayers.) The district court erred in failing to recognize that the scope of the Establishment Clause (and hence the *Lemon* test) is limited, applying only to "laws respecting an establishment of religion."

The logic of undertaking an Establishment Clause analysis with this feature of the First Amendment at the fore is recognized in many of this Court's decisions. For instance, in *Everson v. Board of Education*, 330 U.S. 1, 15 (1947), Mr. Justice Black observed that the First Amendment

. . . means at least this: Neither a state nor the Federal Government can . . . pass *laws* which aid one

religion, aid all religions, or prefer one religion over another.

(emphasis added).

This perspective is likewise found in the Court's opinion in *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963):

The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a *secular legislative* purpose and a primary effect that neither advances nor inhibits religion.

(emphasis added).

A careful reading of the *Marsh* decision shows that the Court made a distinction in that case between a "law" and a longstanding "practice." *Lemon* did not control because a law was not involved. Rather, the Court framed the issue to determine "whether any features of the Nebraska *practice* [of legislative prayer] violate the Establishment clause." *Marsh*, 463 U.S. at 792 (emphasis added).

In a dissenting opinion in *Marsh*, Justices Brennan and Marshall, relying upon the *Lemon* test, attempted to expand that analysis to include state "programs" not instituted by statute. The dissent characterized the majority's decision in *Marsh* as an "exception to the Establishment Clause doctrine to accommodate legislative prayer." *Marsh*, 463 U.S. at 796. Similarly, the lower courts in this case relied upon that interpretation in dismissing *Marsh* as a narrow exception to *Lemon*, extending only to official religious practices, such as legislative prayer, that were in place when the First Amendment was created. We respectfully urge that this analysis is incorrect.

Rather than an exception to *Lemon*, the *Marsh* case should be understood as a different kind of Establishment Clause case, subject to a different analytical standard, precisely because *Marsh* did not concern a statute.

According to *Lemon*, when legislation respecting religion is involved, a court should interpret the language of the First Amendment by directing its attention to

. . . the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity' . . .

Lemon, 403 U.S. at 613. This guideline is based on an interpretation of the First Amendment by this Court in *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 669 (1970). In that case, the Court reviewed the history of state-church interaction in colonial times and noted the state "sponsorship" of the Church of England by the Crown. *Id.* at 668. It is clear in *Walz* that sponsorship meant much more than mere accommodation—the *de minimis* involvement of the state found in the instant case.

B. There Are Areas Where Church And State Can Constitutionally Interact.

There is an area of interaction between church and state which falls outside the bounds of the Establishment Clause as illustrated in *Zorach*. There the Court rejected the notion that church and state were to be "aliens to each other" under the Constitution. *Zorach*, 343 U.S. at 312. Instead, the Court outlined some of the areas where the state may interact with religion:

Churches [can] be required to pay . . . property taxes. Municipalities [are] permitted to render police or fire protection to religious groups.

Id., and, conversely, where religion can interact with the state:

Prayers in our legislative halls; the appeals to the Almighty in messages of the Chief Executive, the proclamations making Thanksgiving Day a holiday; so help me God in our courtroom oaths. . . .

Zorach, 343 U.S. at 312-13.

It is significant that the *Lemon* Court, in qualifying the separation of church and state, mentions only those areas where the state may interact with religion:

Fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are examples of *necessary and permissible* contacts.

Lemon, 403 U.S. at 614 (emphasis added). It is not clear why interaction of religion with the state is not mentioned in *Lemon*, but the district court in this case unwittingly may have been influenced by the Court's lack of attention to this crucial point.

Zorach stands for the proposition that relations between church and state under the Constitution are to be friendly and constructive, not merely "necessary and permissible." The opinion concludes by asserting: "We cannot read into the Bill of Rights . . . a philosophy of hostility to religion." *Zorach*, 343 U.S. at 315. The Court expounded this point in some detail:

When the state encourages religious instruction or *cooperates* with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and *accommodates the public service to their spiritual needs*. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor

blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be *neutral* when it comes to competition between sects.

Zorach, 343-U.S. at 313-14 (emphasis added).

This statement goes to the very heart of the matter now before this Court. The government may "cooperate" with religious authorities without losing its "neutrality." Indeed, the state may "accommodate a public service to the spiritual needs" of the people. That is precisely what the school board did in arranging for a member of the clergy to offer an invocation and benediction in the graduation ceremony in this case.

C. Government May Constitutionally Cooperate With Religion.

Cases in which the state may cooperate with religion without constitutional infraction include those involving a type of "common law" where historical precedent is relevant and dispositive. It is a case of this nature, decided on the basis of longstanding tradition, of which *Marsh* is representative. *Marsh* countenanced the notion that existed at the founding of this Nation that religion has a legitimate role in public life.

Although the Founders opposed preferential treatment for any religious sect, public acknowledgements of religion or incidental interaction between church and state were commonplace. Recognition of this tradition allows the government to create a climate to promote the free exercise of religion, as recognized by the Court in *Walz*:

Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading

to an established church or religion and on the contrary it had operated affirmatively to help guarantee the free exercise of all forms of religious belief.

Walz, 397 U.S. at 678.

In this way, the government can act to balance the Free Exercise and Establishment elements of the First Amendment. As the *Walz* Court recognized, government neutrality—the principal concern of Establishment Clause analysis—must be evaluated in this light.

The Court has struggled to find a *neutral* course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.

Walz, 397 U.S. at 669.

Where there is no law respecting an establishment of religion, the state must have the latitude to fashion its relationship to religion by enhancing the free exercise of religious belief. Viewed with this orientation, the prayers at issue in this case did not run afoul of the First Amendment.

II. EVEN IF *LEMON* WERE A PROPER STANDARD IN THIS CASE, IT HAS BEEN WRONGLY APPLIED BECAUSE THE RESULT OF THE DECISION CONTRADICTS THE PRECEDENTS UPON WHICH *LEMON* IS BASED.

The *Lemon* test can only be properly understood by reference to the precedents the Court relied upon in that case, specifically *Walz* and *Zorach*. *Zorach* stands for the proposition that separation of church and state is not absolute and that “references to the Almighty that run through our laws, our public rituals, [and] our ceremonies” were not proscribed by the First Amendment. *Zorach*, 343 U.S. at 313 (emphasis added). Moreover, the Court in *Zorach* took judicial notice that Americans “are

a religious people whose institutions presuppose a Supreme Being.” *Id.*

In *Walz*, the Court warned against construing “the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history.” *Walz*, 397 U.S. at 671. In addressing the constitutionality of tax exemption of church property, the Court found no state “sponsorship” of religion “since government does not transfer part of its revenue to churches . . .” *Walz*, 397 U.S. at 675.

Viewed in the context of these key precedents which are the foundation for the *Lemon* test, the defects in the lower courts’ analyses can be seen clearly. Not only were ceremonial prayers deemed unconstitutional, the mere reference to deity was viewed as infecting the invocation and benediction. And the district court found sufficient reason to bar clergy from participation in a public ceremony despite the lack of any direct financial benefit to any particular religious organization.

The *Zorach* decision warns that interpretation of the First Amendment to mandate separation between church and state in “all respects” would violate “common sense” and “the state and religion would [become] aliens to each other—hostile, suspicious, and even unfriendly.” *Zorach*, 343 U.S. at 313. The *Walz* Court noted:

Mr. Justice Cardozo commented in *The Nature of Judicial Process* 51 (1921) on the ‘tendency of a principle to expand itself to the limits of its logic’; such expansion must always be contained by the historical frame of reference of the principle’s purpose. . . .

Walz, 397 U.S. at 678-79. In short, the lower courts’ rendering of *Lemon* exceeded the limits of the logic of the Establishment Clause, as that principle was expounded in *Zorach* and *Walz*.

III. THE DISTRICT COURT'S RULING THAT A CEREMONIAL PRAYER WAS UNCONSTITUTIONAL DUE SOLELY TO A REFERENCE TO DEITY IS ERRONEOUS BECAUSE THE GOVERNMENT HAS AN INTEREST IN ACKNOWLEDGING THE EXISTENCE OF A SUPREME BEING.

In *Zorach*, Justice Stewart took judicial notice of the fact that Americans "are a religious people whose institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313. Other decisions such as *Walz*, 397 U.S. at 678 and *Marsh*, 463 U.S. at 792, have highlighted the religious tradition of this Nation. We submit that this history is evidence that the State has an interest in the acknowledgment of religious belief in a Supreme Being. More is involved in this and similar cases than heritage and tradition, for at the heart of this religious belief lies the very foundation of the Bill of Rights.

One need go no further than the Federalist Papers to discern the importance of a robust religious community to the Framers of the Constitution. Madison's view was that a religious orientation would serve as the foundation for personal freedoms and limited government. A religious foundation would enable the new democracy to better meet the challenges before it and would provide a principled basis upon which to build. Surely, the American experiment would end in failure unless the people were principled and virtuous.

Virtue would be promoted by the church, the family and the school. People would conform to the needs of democracy out of a sense of duty. The ultimate allegiance to the "Governor of the Universe" would maintain order and personal freedom.

The importance of religion in the organization of American Society is evident in Madison's statement that

duty to God "is precedent both in order of time and degree of obligation, to the claims of Civil Society." Why was a religious belief in a Supreme Being so important? Because recognition that men were subject to a higher authority would keep society in balance between the extremes of anarchy and despotism.

The Founders believed that government officials were responsible not only to the people, but to a Supreme Being. Hence, each Branch of the federal government acknowledged a religious belief in deity in its practices. The Senate and House of Representatives hired chaplains to offer opening prayers. Prayers were offered at Presidential inaugural ceremonies, and Presidential Proclamations urged public supplication with respect to matters of national destiny. This history helps illuminate the strong interest of the state in acknowledging a religious belief in deity.

The rulings of the lower courts with respect to non-denominational prayer ignore this historical imperative and would produce anomalous results. For instance, the Declaration of Independence would be considered a non-denominational prayer because it refers to a Supreme Being and asks for divine assistance. Under the reasoning of the lower courts, that document could not be read at a public school graduation ceremony in its entirety without violating the Establishment Clause.

In considering a legal challenge to ceremonial prayer or a state action acknowledging a religious belief in deity, courts should first determine if any constitutional rights have been violated; if not, the interests of the parties should then be balanced. (All that is required here is a simple balance of interests. A compelling state interest is not necessary when no constitutional right has been violated.)

A. Respondent's Constitutional Right to Exercise Religious Beliefs Has Not Been Infringed.

In general, the nature of ceremonial prayer does not conflict with the constitutional right to exercise one's religious beliefs. This is because invocations and benedictions at public ceremonies are not like prayers offered in churches. In most religious services the congregation is asked to join in the prayer. However, in public ceremonies, a member of the clergy is introduced and offers a prayer without asking those attending to join. Each person is free to respond as he sees fit—by bowing his head and joining in the prayer, by ignoring it altogether, by speaking with his neighbor, or even by leaving so as not to hear it.

Mr. Weisman does not contend that his constitutional right to freely exercise his religious beliefs has been abridged. Nor does he allege that he was asked to pray. He objected merely because he did not want to witness a prayer being said. But it is impossible, by definition, to force someone to join in prayer, which is spiritual communication with God, if he does not believe in a Supreme Being or does not agree with what is being said. Being merely a witness to prayer in this setting no more involves an establishment of religion than does driving by a Christmas tree and Menorah. See *Lynch v. Donnelly*, 465 U.S. 668 (1984).

B. Respondent Does Not Have an Overriding Interest in Enjoining Ceremonial Prayer at a State-Sponsored Function.

Mr. Weisman's complaint alleged that the school board would not be harmed by an injunction against ceremonial prayer. This is tantamount to saying that the government has no interests at stake in such an instance. Yet at least two state interests plainly suggest themselves; first, to maintain a *belief* that basic human rights are God given and beyond encroachment; second, to promote *faith* in the principles of the American system of demo-

cratic government. By contrast, the government would not have a valid interest in any activity which would give preferential treatment to a particular sect because that would engender partisanship and political dissension.

As for Respondent's interests in the case, his complaint states that he is opposed to the expenditure of tax funds for school ceremonies which include prayer. But the interests here are insignificant because the monetary expenditure required for a clergyman's participation in the graduation exercise would be minimal.

Second, Mr. Weisman is offended by the inclusion of prayer in the public school graduation ceremony of his child. The fact that a prayer is objectionable because it is offered by a person of another belief should not be constitutionally significant unless there is an intention to establish or interfere with religious beliefs or practices. This reasoning reflects one of the underlying purposes of the First Amendment, which is to protect freedom of conscience. In this case, Mr. Weisman and his child were of the same faith as the religious official offering the prayer. Thus, it is difficult to understand how the Weismans' freedom of conscience could have been suppressed.

A person's being offended should not be a sufficient ground to find an Establishment Clause violation. Presumably, virtually any prayer could be offensive to someone. Moreover, there are certain to be individuals who attend public ceremonies that would be offended if a non-denominational prayer were not offered.

Finally, suppose there were others attending the graduation ceremony who were offended not by prayers, but by the remarks of the commencement speaker, which would, of course, be protected speech. Should offense at religious statements be more constitutionally significant than offense at political statements? The answer would be self-evident to the Framers because the principles of

religious freedom and political freedom developed simultaneously in their experiences founding the new government.

IV. THE ANALYSES OF THE LOWER COURTS DO NOT SHOW THAT THE PRAYERS AT ISSUE VIOLATE THE *LEMON* TEST.

Under the *Lemon* test as rendered by the lower courts in this case, state action which fails to satisfy any one of the following criteria is improper: the practice must have a secular purpose; its principal or primary effect must be one that neither advances nor inhibits religion; and the practice must not foster an "excessive entanglement" with religion.

The second prong of the *Lemon* test—requiring government neutrality vis-à-vis religion—has been the most prominent concern of Establishment Clause analysis. The Court has held that government must "pursue a course of complete neutrality toward religion." *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). Elsewhere the Court has stated: "Government in our democracy, state and nation, must be neutral in matters of religious theory, doctrine, and practice. . . . The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97 (1968). Likewise, "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion," *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

Assuming *Lemon* were the relevant precedent for this case, there are fundamental flaws in the way the *Lemon* criteria were applied by the courts below. Principally, the lower courts' arguments are unsound because they prove too much. Ostensibly demonstrating an "establishment" of religion, the arguments actually eliminate the possibility of a neutral position altogether.

A. The Challenged Activity Achieved a Secular Purpose.

Regarding this first prong of the *Lemon* analysis, Circuit Judge Bownes reasoned as follows:

Although reciting a prayer before a graduation ceremony might, as appellants argue, have the residual sectarian effects of solemnizing the occasion, the primary purpose is religious. Specifically invoking the name and the blessing of 'God' on the graduation ceremony is a supplication and thanks to 'God' for the academic achievement represented by the graduation and a hope for the continuation of such good fortune. It does not serve a purely or predominantly solemnizing function. A graduation ceremony does not need a prayer to solemnize it.

Petition at 9a-10a.

Judge Bownes' reasoning is reminiscent of other cases in which religious activity has been deemed unconstitutional because it assertedly lacked a secular purpose. See, e.g., *Jager v. Douglas County School District*, 862 F.2d 824 (11th Cir. 1989) (finding practice of having invocations given prior to public high school football games violates First Amendment); *Graham v. Central Community School District*, 608 F.Supp. 531 (S.D. Iowa 1985) (striking down commencement invocation and benediction for lack of a secular purpose). The specific religious activity of prayer is particularly troublesome to advocates of this position because "prayer is the quintessential religious practice impl[ying] that no secular purpose can be satisfied." *Jaffree v. Wallace*, 705 F.2d 1226, 1534 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985). While this argument is beguiling, it fails upon closer inspection.

Judge Bownes' argument attempts to demonstrate that a prayer in this setting "does not serve a purely or predominantly solemnizing function" by showing (1) that the prayer is purely religious in nature and (2) that "a graduation ceremony does not need a prayer to solemnize

it." This latter claim is essential to the argument, for even if prayer is purely religious in nature, it can serve the function of solemnizing an occasion.

As it is stated, however, the second claim cannot carry the weight of the argument, for it implies that a prayer can only serve the solemnizing function if the prayer is required for the occasion to be solemnized. As a point of logic, of course, this does not follow. Something can serve a function without being necessary for it. For example, a table can serve the function of being where family meals are held without it being necessary that family meals are held at the table. Yet this implication of Judge Bownes' argument is significant, for it shows that he unwittingly applied not the actual first *Lemon* criterion but a stricter, untenable version of it: Instead of checking for a secular purpose, the stricter form requires that we check for a secular purpose *that cannot be achieved by non-religious means*.

But the *Lemon* test must be used as it stands, if it is to be used at all, because strengthening the formulation would rule out legitimate cooperation between government and religion. For example, it would rule out the use of a military chaplaincy, where the argument on behalf of cooperation between government and religion has to do with chaplains instructing troops on moral and ethical matters. Clearly, however, no such justification could succeed if the stricter version of the first *Lemon* criterion were adopted. As this Court has observed, "[f]ocus *exclusively* on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch*, 465 U.S. at 680 (emphasis added). Since such a result would be manifestly at odds with the purpose of the First Amendment, *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973), this stricter formulation of the first *Lemon* prong must be rejected.

If, instead, Judge Bownes had meant to point out that graduation ceremonies are already solemn occasions, and thus that no prayer is needed to cause the occasion to be solemn, the argument is equally problematic. For the prayers need not be viewed as related to the solemnizing function as causes are to their effects. Instead, the prayers can serve this function by being *an expression*, rather than a cause, of the solemnity of the occasion. This purpose is every whit as secular as that of causing it to be the case that the event is solemn.

If there is an argument from the first prong of the *Lemon* test in this case, more must be said than that a graduation ceremony does not need a prayer to solemnize it. That is not enough to show that "government's actual purpose is to endorse . . . religion," as required under this aspect of the analysis. *Lynch*, 465 U.S. at 690. Rather, what must be shown is that the solemnizing function is not served by the prayer, or that it is not well served by it. But the lower courts presented no argument for either of these claims.

B. The Challenged Activity Did Not Advance or Inhibit Religion.

As analyses under this *Lemon* criterion have been articulated in court decisions, a chiefly "subjective" focus has emerged:

[A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely *to be perceived* by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices.

School District of City of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985) (emphasis added).

The opinion of the district court contains ample evidence of this orientation:

It is the union of prayer, school and important occasion that creates an identification of religion with a school function. The special nature of the graduation ceremonies underscores *the identification that Providence public school students can make.*

And again,

Schoolchildren who are not members of the religions sponsored, or children whose families are non-believers, *may feel as though* the school and government prefer beliefs other than their own.

Petition at 25a (emphasis added).

At least two critical shortcomings appear, however, when exclusive attention is given to students' subjective impressions.

1. The argument from students' perceptions eliminates the possibility of a neutral position. Specifically, whenever government and religion are publicly associated, *support* for religion might be inferred by some students; and whenever the two are purposefully separated, *hostility* to religion might be inferred by others. If the argument based on students' perceptions is sound going one direction, it must be sound going the other. But taking both to be sound forecloses a neutral governmental position.

In this connection, the conceptual thicket created by use of an undefined metaphor such as "symbolic union," *School District of Grand Rapids*, 473 U.S. at 390, is evident if we assume *arguendo* that the activity at issue in this case in fact runs afoul of the Establishment Clause. To avoid constitutional infraction the government would be constrained to exclude religion from "milestone" events, rites of passage and other public ceremonies. Yet, in that event, a quite different message would be communicated. Careful exclusion of religion from events where invocations and benedictions are customarily pro-

nounced could be viewed as a symbolic preference on the part of the government for non-religion.

Ironically, this point was explicitly recognized by the district court. With respect to the exclusion of references to deity, the court observed: "Students might conclude that a deity is not an important part of their lives. [However,] this Court is not permitted to ruminate concerning the aptness of this possible result as the Establishment Clause is currently construed." Petition at 24a n. 7.

The district court's view that a concern for the "aptness of this possible result" would be out of harmony with the law indicates a myopia symptomatic of much Establishment Clause analysis. With their attention riveted on whether religion is unconstitutionally advanced in a given case, the courts often overlook that the very test applied to make that judgment may, in the circumstances, preclude the possibility of a neutral position.

2. Audience perceptions are not verifiable. Under the subjective effects analysis, the issue of governmental endorsement becomes a consideration of how the actions of the government will or might be misunderstood. Because this approach necessarily requires courts to make difficult calculations which, even in the end, are inherently non-verifiable, its value is extremely limited.

Instead, if there are more objective features to the practice which allegedly advances religion, the focus should be on these. It was a state-church relationship in this stricter sense which the Court had in mind in *Abington School District* when it warned of history's teaching that

powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Govern-

ment would be placed behind the tenets of one or all of the orthodoxies.

374 U.S. at 222. The only activity which should legitimately cause concern is if government and religion are acting in concert to further the interests of religion by statute or regulation. If, however, both parties are merely participating in a rite of passage for students, with each having its own purposes, no objectionable union or concert should be found.

There is no evidence in the instant case of any concert between the government and religion. The evidence only supports identification in the weaker sense: The state, in this case through public school teachers and administrators, supports a public function which *associates* religious and governmental activities.

C. The Challenged Activity Did Not Involve Excessive Entanglement of Government and Religion.

Though neither the district court nor the court of appeals rest their decisions on the excessive entanglement prong, Judge Bownes was struck by the occurrence of excessive governmental entanglement with religion in this case because school officials were involved both in choosing the individual who led the prayers and in providing guidelines for a suitable non-denominational prayer. Thus, Judge Bownes argues that "[t]his supervision of the content of the prayers by the school officials implicates the entanglement prong," and that choosing the person who leads the prayer "has the effect of involving those teachers in choosing among various religious groups." Petition at 10a-11a.

The guidelines provided, however, were not state regulations; they were instead a set of standards set by a non-denominational religious organization, the National Conference of Christians and Jews. In offering these guidelines, the state was not attempting to regulate religion; it was merely trying to comply with the mandate

of the Establishment Clause itself not to support a particular religion.

In sum, none of the arguments from the three prongs of the *Lemon* test provides a sufficient basis for finding that the prayers at issue violate the Establishment Clause. For the arguments chronicled above focus on only one side of the issue. They consider whether a practice advances religion but fail to consider whether, turned in the other direction, the same analysis would inhibit religion. This oversight is due to an unarticulated assumption that a neutral position in cases involving the Establishment Clause has been carved out already when, in fact, the very tests utilized to assess the challenged actions preclude genuine neutrality toward religion.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 90-1014

IN THE
Supreme Court of The United States

October Term, 1990

ROBERT E. LEE, ET AL.,

Petitioners,

v.

DANIEL WEISMAN, ETC.

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the First Circuit

BRIEF AMICI CURIAE OF
THE RUTHERFORD INSTITUTE AND
THE RUTHERFORD INSTITUTES OF ALABAMA,
ARIZONA, ARKANSAS, CALIFORNIA, COLORADO,
CONNECTICUT, DELAWARE, FLORIDA, GEORGIA,
HAWAII, ILLINOIS, KANSAS, KENTUCKY, LOUISIANA,
MARYLAND, MICHIGAN, MINNESOTA, NEBRASKA,
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IN THE
Supreme Court of The United States

October Term, 1990

ROBERT E. LEE, ET AL.,

Petitioners,

v.

DANIEL WEISMAN, ETC.

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the First Circuit

BRIEF AMICI CURIAE
IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

This case is not about an establishment of religion by the government. Those who framed the United States Constitution never contemplated that the First Amendment Establishment Clause¹ would be used to prohibit a simple invocation or that a benediction at a public school graduation ceremony could amount to the establishment of religion. This case is really about censorship and, if decided wrongly, its consequences could be the eradication of any religious message, reference and symbol from American public life. This would be a fundamental change in the nature of American society.

¹ The Establishment Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. amend. I.

Amici curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish divine and Rector at St. Andrew's University. With thirty-one state chapters, three international chapters, and an international headquarters in Charlottesville, Virginia, *amici curiae* assist litigants and participate in significant cases relating to the freedom of speech of religious persons in public schools and universities. Counsel for *amici curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in numerous cases before this Court. *Amici curiae* believe the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF FACTS

Amici curiae adopt by reference the statement of facts set forth in Petitioners' Brief filed with this Court.

SUMMARY OF ARGUMENT

Public school graduation ceremonies constitute a limited public forum designated by the school for public activities related to graduation. As such, wholly content-based exclusion of religious speech which is consistent with appropriate graduation themes is unconstitutional absent a compelling state interest in such an exclusion. Establishment Clause concerns are insufficient because of the lack of significant governmental action other than designation of the forum and institution of reasonable time, manner and place restraints designed to reserve the forum for its intended purpose. Respondent has identified no other state interest recognized by this Court as compelling and, thus, cannot be allowed to use the government and the United States Constitution to further his vicarious censorship. Furthermore, the exclusion sought by Respondent is facially overbroad and unreasonable and, therefore, cannot qualify as a reasonable time, manner or place restraint. Therefore, the content-based exclusion of religious speech at public school graduation ceremonies in a designated public forum is unconstitutional and may not be permitted by this Court.

ARGUMENT

I. Exclusion of Prayer at Public School Graduation Ceremonies Is Unconstitutional Censorship by the Government.

One of the core values of the First Amendment to the United States Constitution² is its prohibition of censorship. This core value is especially critical where the government seeks completely to prohibit a particular message or a category of speech. Such prohibitions greatly impede informed citizenship and impair individual freedom to develop and express ideas. As Justice Byron White has said: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee....It is one right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

The danger in this case is that "[t]he government might well achieve large-scale censorship by small steps in many separate contexts, each appearing reasonable by itself." Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219, 1242 (1984). Respondent is asking this Court to take just such a "small" step by prohibiting the simple act of prayer at public school graduation ceremonies. Such a prohibition may appear reasonable to some, or at least a matter *de minimis*. However, such an exclusion is, in reality, yet another step toward large-scale censorship of religion and wholesale eradication of religious messages, references and symbols from American public life.

The censorship Respondent seeks from this Court is constitutionally impermissible. In fact, as *amici curiae* will show, this Court's reasoning on similar issues leads to the inescapable conclusion that accommodation of prayer at public school graduation ceremonies is

² The First Amendment says: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

not only constitutionally permissible, it is constitutionally *mandated* under this Court's public forum doctrine.

II. Graduation Ceremonies on Public School Grounds Constitute a Limited Public Forum.

This Court has "adopted a forum analysis" as a means of balancing the government's interest in reasonably controlling access to its forums against the nation's commitment to a vigorous and free exchange of ideas. *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 800 (1985).

The limited, or designated,³ public forum is the second category of the three-part forum analysis developed by this Court. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Cornelius*, 473 U.S. at 802. This Court has defined the limited public forum as "public property which the State has opened for use by the public as a place for expressive activity." *Perry*, 460 U.S. at 45. In *Cornelius*, *supra*, this Court explained further that "a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by *certain speakers*, or for the discussion of *certain subjects*." *Cornelius*, 473 U.S. at 802 (citing *Perry*, 460 U.S. at 45 and 46, n.7) (emphasis supplied).

Determination of forum classification is based upon two factors. The first factor concerns the *intent* of the government to open the forum, including the compatibility of the forum with expressive activity. *Cornelius*, 473 U.S. at 802. The second factor concerns the *extent* of use granted by the state. *Perry*, 460 U.S. at 49.

³ There is some controversy concerning the possible distinction between a limited public forum and a designated forum. See M. Nimmer, *Nimmer on Freedom of Speech*, Section 4.09[D] n. 168 (1984 student ed.). The Second Circuit has recently recognized the limited public forum as a subcategory of the designated public forum. *Travis v. Oswego-Appalachian School Dist.*, No. 90-7689, LEXIS 3502 (2d Cir. 1991) (religious group use of school auditorium). In *Travis*, the Second Circuit defined the limited public forum as that created "when government opens a nonpublic forum but limits expressive activity to certain kinds of speakers or to the discussion of certain subjects." *Id.* The court held that the expressive activity was within the "category of speech" that the government had allowed previously. Acknowledging that such use does not open the forum to any and all expression, the court held that it did open the forum to expression consistent with the category of expression previously permitted. *Id.* (emphasis supplied). *Amici curiae* use the terms interchangeably.

In *Cornelius*, *supra*, this Court recognized that if not expressly indicated, intent to designate a forum may be found by looking at the government's policy and practice. *Cornelius*, 473 U.S. at 802. See also *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (university policy of making facilities available to registered student groups created public forum for their use); *Madison Joint School Dist. v. Wisconsin Emp. Rel. Comm'n*, 429 U.S. 167 (1976) (statute providing for open school board meetings created forum for citizen involvement); and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (municipal auditorium and city-leased theaters designed for and dedicated to expressive activities created public forum). In the present case, the intent of the school administration to open the forum to expressive activity is clear. The policy of the school is to allow a member of the clergy to give a brief invocation and benediction at its graduation ceremonies. *Weisman v. Lee*, 728 F. Supp. 68, 69 (D.R.I. 1990). Furthermore, it is evident from the Agreed Statement of Facts that the school administration opened the forum to clergy of all faiths by allowing speakers from different religions to participate.⁴ See Respondent's Brief in Opposition to Petition for Writ of Certiorari, app. at A-4-A-8, *Weisman v. Lee* [Supreme Court No. 90-1014]).

Further, an inquiry into the "nature of the property and its compatibility with expressive activity" aids in the determination of intent. *Cornelius*, 473 U.S. at 802. See also *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977) (public forum not created where need for prison order and security is inconsistent with expressive activity); *Greer v. Spock*, 424 U.S. 828 (1976) (nature of military reservations not compatible with partisan political activities); *Adderley v. Florida*, 385 U.S. 39 (1966) (jailhouse grounds not compatible with public forum activities); and *Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1371 (3d Cir.), *cert. denied*, 111 S. Ct.

⁴ Rather than eliminate graduation prayer, the dissent in *Weisman*, *supra*, urges schools to broaden participation in graduation ceremony invocations and benedictions by inviting even those with "non-religious" beliefs to participate. *Weisman*, 908 F.2d at 1099 (Campbell, Circuit Judge, dissenting). Judge Campbell explained: "In brief, I think the First Amendment values are more richly and satisfactorily served by inclusiveness than by barring altogether a practice most people wish to have preserved." *Id.* Although some speakers might use words consistent with their particular belief which might offend some, the next year it would be a different speaker with different beliefs. *Id.*

253 (1990) (after-school hours use of public school facilities compatible with expressive activities). As such, it is clear that prayer at graduation ceremonies is compatible with the nature of the graduation ceremony forum.⁵ The tradition of including invocations and benedictions in a graduation ceremony began in America at Harvard in 1642.⁶ The practice has become so ingrained in American commencement exercises that a typical commencement is described by one author as consisting of "an invocation, a commencement address, the awarding of earned degrees, the awarding of honorary degrees, and the benediction." K. Sheard, *Academic Heraldry in America* (1969).

The second factor in determining the existence of a limited public forum concerns the *extent of use granted by the state*. *Perry*, 460 U.S. at 46-47. In assessing the extent of use granted, the Court has scrutinized the "certain speakers" granted access and the "certain subjects" permitted to be discussed. *Cornelius*, 473 U.S. at 802.⁷ See also *Gregoire*, 907 F.2d at 1371.

The "certain speakers" in the present case before this Court are the outside individuals allowed to speak to the graduates during the ceremony, including those who give the invocation and benediction. *Weisman*, 728 F. Supp. at 69. Non-school speakers may also give a commencement address. The lower court opinions in *Weisman* do not record whether the school district allowed an outside speaker to address the students, but such an assumption is not unreasonable considering the elements of the traditional graduation ceremony. While not determinative, allowing an outside speaker to deliver the

⁵ It is important to note that a "physical situs" is not necessary for a forum to exist. *Student Gov't Ass'n v. Bd. of Trustees of Univ. of Mass.*, 868 F.2d 473, 476 (1st Cir. 1989). A public or limited public forum can be an "intangible channel of communication" such as the school's internal mail system in *Perry* and the fundraising drive in *Cornelius*. *Student Gov't.*, 868 F.2d at 476.

⁶ A. Fink, *Evaluation of Commencement Practices in American Public Secondary Schools* (1940). See generally M. Gunn, *A Guide to Academic Protocol* (1969) and J. Whitehead, *The Rights of Religious Persons In Public Education* (1991).

⁷ This language was first recorded in a footnote to the *Perry* decision. *Perry*, 460 U.S. at 46, n.7. That footnote referenced *Widmar*, 454 U.S. 263 and *Madison Joint School Dist.*, 429 U.S. 167.

commencement address nonetheless further demonstrates the school's intent to open its forum.

The "certain subject" in the present case is the same in all graduation ceremonies: to encourage, inspire, and admonish the graduates to attain higher goals as they reflect on their past accomplishments. *Weisman*, 728 F. Supp. at 69. There can be no doubt that prayer at graduation ceremonies is consistent with this theme and was, in fact, consistent with this theme in the present case. As the dissenting circuit court judge noted:

It seems anomalous to outlaw Rabbi Gutterman's tolerant, benign, nonsectarian supplication—a message so entirely appropriate in that setting, and surely inoffensive to virtually all of those present.

Weisman, 908 F.2d at 1098 (Campbell, Circuit Judge, dissenting) (emphasis supplied).

In sum, when the school intentionally opened its forum to non-school persons for speech on commonly understood themes of graduation, it created a limited public forum for speech related to such themes, regardless of viewpoint or content.

III. Respondent Seeks Content-Based Exclusions of Speech in a Limited Public Forum.

Respondent and the lower courts "misconceive the nature" of this case. See *Widmar*, 454 U.S. at 273. "The question is not whether the creation of a religious forum would violate the Establishment Clause. . . . the question is whether it can exclude groups because of the content of their speech." *Widmar*, 454 U.S. at 273, citing *Healy v. James*, 408 U.S. 169 (1972).

This Court has said that "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject." *Cornelius*, 473 U.S. at 806. A restriction which proscribes speech solely because of its religious content is, of course, content-based. Content-based exclusions describe permissible speech in terms of its subject matter. See, e.g., *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972). In *Widmar*, *supra*, this Court held that excluding religious speech from a limited public forum was a content-based restriction.

Widmar, 454 U.S. at 269-70. In *Widmar*, the university had discriminated against student speakers because they wanted to engage in religious speech. This Court held that such speech was protected by the First Amendment and could not be forbidden absent a compelling state interest that would be served by a narrowly drawn restriction. *Id.*

The exclusion of speech sought by Respondent is *wholly content-based*. The speech sought to be proscribed is religious speech. The district court stated that nothing in its decision "prevents a cleric of any denomination or anyone else from giving a *secular* inspirational message at the opening and closing of the graduation ceremonies." *Weisman*, 728 F. Supp. at 74 (emphasis supplied). The only unconstitutionality found by the district court was that the word "God" was used in the invocation and benediction. *Id.* In fact, counsel for Respondent conceded during argument at trial that if the word "God" had been omitted from the Rabbi's prayer, the Establishment Clause would not be implicated. *Id.* at 74-75, n. 10.⁸

Certainly, then, there can be no doubt that the exclusion sought by Respondent is a content-based exclusion of religious speech.

IV. The Constitution Prohibits Content-Based Exclusions of Speech In a Limited Public Forum Absent a Compelling State Interest.

The state is not required indefinitely to retain the open character of a designated public forum. However, as long as the forum remains open, the state "is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Perry*, 460 U.S. 46, citing *Widmar*, 454 U.S. at 269-70; see also *Cornelius*, 473 U.S. at 800.

⁸ Amazingly, the district court revised the benediction Rabbi Gutterman delivered by excluding the word "God" and set forth the revised version in a footnote to its opinion. *Weisman*, 728 F. Supp. at 75, n. 10. Moreover, both lower courts conceded that the issue centered on whether an invocation or benediction invoking a deity delivered by clergy at an annual public school graduation violated the Establishment Clause. *Weisman*, 728 F. Supp. at 70, and *Weisman*, 908 F.2d at 1090. In the words of district court Judge Boyle, "[t]he plaintiff here is contesting only an invocation or benediction which invokes a deity or praise of a God." *Weisman*, 728 F. Supp. at 75.

As Justice Marshall wrote in *Mosley*, *supra*, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Mosley*, 408 U.S. at 95. Justice Marshall noted:

To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control....Necessarily, then...government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views....There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. *Selective exclusions from a public forum may not be based on content alone*, and may not be justified by reference to content alone.

Id. at 95-96 (citation omitted) (emphasis supplied).

To pass constitutional muster, this Court has made it very clear that a restraint on speech must be "justified without reference to the content of the regulated speech." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (regulation restricting overnight sleeping to designated areas was constitutional since it was neutral with regard to the message presented by overnight sleeping in connection with demonstration against homelessness). See also *Boos v. Barry*, 485 U.S. 312 (1988) (city ordinance constituted unconstitutional content-based restriction on political speech in public forum that was not narrowly tailored to serve compelling state interest); *Board of Educ. v. Pico*, 457 U.S. 853 (1982) (school board has broad discretion regarding school affairs and may remove books from the school library that it finds to be "pervasively vulgar" or "educationally unsuitable"); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (city ordinance discriminating against billboard use on basis of content was facially unconstitutional); *Widmar*, 454 U.S. 263 (state university's

content-based exclusionary policy was not shown to be necessary to serve a compelling state interest and was not narrowly drawn to achieve that end); *Erzoznik v. Jacksonville*, 422 U.S. 205 (1975) (city ordinance discriminating against movies solely on basis of content was facially invalid as infringement on First Amendment); *White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990) (city ordinance which proscribed personal, impertinent, slanderous or profane remarks in a limited public forum was constitutional); and *El-Amin v. West*, No. 88-0278-R, LEXIS 17511 (E.D. Va. 1988) (city created a limited public forum by, among other things, confining speech to a certain subject matter).

Respondent has demonstrated no such compelling interest in excluding the religious speech in question.

V. Establishment Clause Concerns In This Case Are Insufficient to Satisfy the Requirement of a Compelling State Interest.

This Court has dismissed the notion that simply including religious speech in a limited public forum is an advancement of religion inimicable to the Establishment Clause. See *Widmar*, 454 U.S. 272. Indeed, Justice Powell said:

We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling. *It does not follow, however, that an "equal access" policy would be incompatible with this Court's Establishment Clause cases.*

Id. Thus, Respondent's quest for vicarious religious censorship cannot masquerade as Establishment Clause concerns that rise to the level of a compelling state interest sufficient to justify content-based exclusions of speech in this case.

This Court has emphasized that the Establishment Clause is not a bar to individual action. It is a limit on the federal and state governments. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). As one lower court has well articulated: "The threshold question in any Establishment Clause case is whether there is sufficient governmental action to invoke the prohibitions." *Rivera v. East Otero School Dist. R-1*, 721 F. Supp. 1189, 1195 (D. Colo. 1989) (emphasis supplied).

"It is clear that the mere fact that speech occurs on school property during a school ceremony does not make it government supported." *Id.* (emphasis supplied). Chief Justice Burger has said as well:

[T]he several commands of the First Amendment require vision capable of distinguishing between *state* establishment of religion, which is prohibited by the Establishment Clause, and *individual* participation and advocacy of religion which, far from being prohibited by the Establishment Clause, is affirmatively protected by the Free Exercise and Free Speech Clauses of the First Amendment. If the latter two commands are to retain any vitality, utterly unproven, subjective impressions of some hypothetical students should not be allowed to transform *individual* expression of religious belief into *state* advancement of religion.

Bender v. Williamsport Area School Dist., 475 U.S. 534, 553, *reh'g denied*, 476 U.S. 1132 (1986) (Burger, C.J., dissenting) (emphasis in original).

In *Everson*, *supra*, this Court catalogued the type of governmental actions that violate the Establishment Clause. These are: no official or state church; no coercion to attend or remain away from church or to profess a belief or disbelief in any religion; no punishment for religious beliefs or disbeliefs; no preference of one religion over another; no participation in the affairs of religious organizations or participation by religious organizations in the affairs of government; and no tax levied to support religious activities or institutions. *Everson*, 330 U.S. at 15-6. The government has taken none of these actions in this case.

In the present case, the only significant government action is designation of the forum.

- The government did not give the prayer. The rabbi that offered the prayer is a *private individual* and not an employee of the school. As Justice O'Connor has said: "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school stu-

dents are mature enough and are likely to understand that a school does not endorse or support...speech that it merely permits on a nondiscriminatory basis." *Bd. of Educ. of Westside Community Schools v. Mergens*, 110 S. Ct. 2356, 2372 (1990) (emphasis in original).

- The government did not compose the prayer. See *Engel v. Vitale*, 370 U.S. 421 (1962) (reading of state-composed, non-denominational, non-compulsory prayer in public schools violates Establishment Clause).
- The primary effect of the graduation ceremony in this case neither advances nor inhibits religion. See *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (state requirement for daily reading from the Bible in public school had primary religious effect even with provisions for excusal).
- The government's purpose in sponsoring the graduation ceremony is not to endorse religion. See *Wallace v. Jaffree*, 472 U.S. 38 (1985) (government's purpose for one-minute voluntary silent prayer in public schools was unconstitutional endorsement of religion).
- The government did not request the audience at the graduation ceremony to participate in the graduation prayer. See *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983), *aff'd*, 466 U.S. 924 (1984) (joining with students by public school teacher to read prayer aloud during school day violates Establishment Clause).
- The government did not include graduation prayer as part of its required educational activities. See *Hazlewood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (school newspaper may constitutionally limit content of newspaper that is written and published as part of journalism class coursework).
- Graduation ceremonies occur but one time a year so the risk of state indoctrination is remote. See *Wiest v.*

Mt. Lebanon School Dist., 457 Pa. 166, 320 A.2d 362, 370, *cert. denied*, 419 U.S. 967 (1974) (invocation and benediction at public high school graduation ceremonies were so remote from classroom or educational program involved that they did not constitute type of activity contemplated by Establishment Clause) and *Wood v. Mt. Lebanon Township School Dist.*, 342 F. Supp. 1293, 1294 (W.D. Pa. 1972) (public high school graduation ceremony was not part of compulsory school curriculum and did not violate Establishment Clause).

Where there is governmental action which rises to an Establishment Clause concern, this Court has developed a three-part test to determine whether such governmental action amounts to a violation of the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602 (1970). The *Lemon* test is inapplicable to this case since there is no governmental action in connection with this graduation prayer that is significant enough to implicate the Establishment Clause. The only significant government action here is *designation of the limited public forum*.

Moreover, any argument for finding government "endorsement" of religion merely by *permitting prayer* at graduation simply is misplaced. Such does not rise to the level of an Establishment Clause concern. As this Court has held, merely designating a forum does not "confer any imprimatur of state approval on religious sects or practices." *Widmar*, 454 U.S. at 274.

Of course, there is always a risk that someone might conclude that the state has approved a speaker's message whenever any speaker uses state property as a public forum.⁹ However, if mere apprehension of such a danger were enough to violate the Establishment Clause, no religious speaker could ever appear on state property. The fact is that this Court has clearly acknowledged the right of religious speakers

⁹ The logical absurdity of avoiding this risk entirely can be seen by considering the armed forces. The official United States military uniform could arguably be a limited public forum and, thus, some could conclude that prayer offered by a man in combat is a message approved by the state and thus an unconstitutional establishment of religion by the state.

to use public forums on equal terms with others using the forum. *Widmar*, 454 U.S. at 271.

Therefore, this Court's test of government endorsement is whether an observer seeing the overall religious display or presentation might *reasonably* conclude that the government is endorsing a religious message. See *Allegheny County v. ACLU*, 109 S. Ct. 3086 (1989) (nativity scene violated Establishment Clause) and *Lynch v. Donnelly*, 465 U.S. 668 (1984) (nativity display did not violate Establishment Clause). No such reasonable conclusion can be drawn from the present case.

It is apparent, then, that this Court views *context* as the single most important factor resolving the question of endorsement. As long as the religious display or presentation is part of a larger display or presentation and the larger ceremony or display is not reasonably seen as having a solely religious purpose or predominantly religious effect, such display or presentation does not implicate the Establishment Clause by way of government "endorsement." In the context of graduation ceremonies, an invocation and benediction simply do not render the event predominantly religious. Moreover, reasonable persons could not assert that the act of prayer at a graduation ceremony makes the purpose of the ceremony solely religious. Such an assertion is ludicrous.

Concerns regarding the risk of undue influence, and thus the "establishment" of religion, that this Court found in the classroom prayer and Bible-reading cases¹⁰ are ill-founded with respect to graduation ceremonies. The graduates involved in the present case are now young adults and "graduated" high school students who are able to distinguish between school-sponsored and school-permitted ideas. See *Mergens*, 110 S. Ct. at 2372. As Justice O'Connor noted in another case, ceremonial acknowledgments of religion are different than school prayer because they are "primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination." *Wallace*, 472 U.S. at 81 (O'Connor, J., concurring).

¹⁰ *E.g.*, *Engel*, 370 U.S. 421 (1962); *Abington School Dist.*, 374 U.S. 203 (1963); *Wallace*, 472 U.S. 38 (1985).

VI. The Unconstitutional Content-Based Exclusion Sought by Respondent Is Not Related to Any Sufficiently Compelling State Interest And Does Not Qualify As a Reasonable Restriction.

Respondent has articulated no constitutionally cognizable state goal which would be furthered by excluding prayer from graduation ceremonies.

In order for the state, in the person of school officials, to justify prohibitions of a particular expression, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort that may accompany another viewpoint. *Rivera*, 721 F. Supp. at 1194. As one court has written:

No court can enjoin speech on the basis of an unsupported assertion that it may offend the sensibilities of some prospective listener. Neither we nor the hearing court could properly assume that those invited to deliver the invocation and benediction at the graduation ceremony would not take account of the public and ceremonial nature of the occasion and the presence of students and the adults of all persuasions. So too there is no basis for concluding that a speaker chosen to emphasize the seriousness of the public commencement would not fashion an appropriate message which neither requires any individual to participate in an affirmation which might run counter to his personal belief nor places the state's imprimatur on any sectarian declaration.

Wiest, 320 A.2d at 367 (Roberts, J., concurring) (citations omitted).

This Court has indicated that in order to justify its restrictions on speech, the state must show that the restriction furthers an important or substantial interest unrelated to the suppression of free expression and that the incidental restriction is no greater than is essential to the furtherance of that interest. *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968). See also *Frisby v. Schultz*, 487 U.S. 474 (1988) (state has significant interest in protecting residential privacy that justifies a narrowly tailored content-neutral ban on picketing which takes place solely in front of a particular residence); *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981) (state has significant

interest in orderly movement of crowds at state fair which justifies content-neutral restriction on distribution, sales and solicitation activities to fixed location); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976) (state has significant interest in protecting citizens from crime and undue annoyance that justifies requiring door-to-door solicitors or canvassers to identify themselves to local officials; ordinance nevertheless invalid for vagueness); *Cameron v. Johnson*, 390 U.S. 611 (1968) (state interest in unimpeded ingress to and egress from public buildings compelling enough to justify barring picketing that obstructs or unreasonably interferes with it); and *Talley v. California*, 362 U.S. 60 (1960) (state interest in prevention of fraud, deceit, false advertising, negligent use of words, obscenity and libel inadequate to support prohibition of anonymous handbills). No such burden of proof can be met in this case.

This Court has said that the government may regulate the content of expression to "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation of speech is reasonable," *Perry*, 460 U.S. at 46 (emphasis supplied), and as long as such regulations are "viewpoint neutral." *Greer*, 424 U.S. 828 (regulations banning partisan political speeches and demonstrations not facially unconstitutional). See also *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980). Constitutional reasonableness, however, requires that content-based restrictions on speech be narrowly tailored to serve the government's compelling interest in restricting the speech. *Widmar*, 454 U.S. at 268 and *Consolidated Edison*, 447 U.S. at 540. See also *Metromedia*, 453 U.S. 490. Such restrictions may not burden substantially more speech than is necessary to further the significant government interest. "The First Amendment hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion on an entire topic." *Consolidated Edison*, 447 U.S. at 537. See also *Schneider v. State*, 308 U.S. 147 (1939) (significant state interest in keeping streets clean does not justify barring all distribution of handbills since this would suppress a great quantity of speech that does not cause the evils sought to be prevented).

Petitioners do not disagree with the propriety of reasonable restrictions imposed on graduation speakers which would "reserve the forum for its intended purposes." See *Perry*, 460 U.S. at 46 and

Cornelius, 473 U.S. at 806. In fact, Petitioners have used great care to ensure that any prayers at its graduation ceremony are consistent with the tone and theme of such an important event. *Weisman*, 728 F. Supp. at 69.¹¹

Nonetheless, a complete ban on any mention of a deity in an invocation or benediction is much more than a regulation reserving the forum for its intended purpose. Moreover, Respondent is completely unable to fairly characterize the unbounded solely content-based exclusion of religious speech from public graduation ceremonies as a prohibition which is "narrowly drawn to effectuate a compelling state interest." *Perry*, 460 U.S. at 46, citing *Widmar*, 454 U.S. at 269-70.

CONCLUSION

Drawn to its logical conclusion, a holding that excludes the mention of a deity in graduation invocations and benedictions would lead to complete religious censorship and the eradication of religion from American public life.

For example, if this Court holds that it is unconstitutional to mention a deity at the beginning of a graduation ceremony, the American pledge of allegiance would be prohibited because it mentions "one nation under God," patriotic anthems which use the word "God" would be prohibited, and any poem or other inspirational message that connotes a deity would be proscribed. America's Thanksgiving holiday and National Day of Prayer would be discontinued for their unconstitutionality and the President of the United States would dare not appear near the national Christmas tree for fear of "endorsing" religion and, therefore, acting unconstitutionally. The President as well would forever be forbidden to invoke God's blessing on our nation as he has done so many times. As the dissent at the court of appeals worried, courts might next be required to outlaw the reading of Walt Whitman or Keats at graduation ceremonies. *Weisman*, 908 F. 2d at 1097 (Campbell, Circuit Judge, dissenting).

¹¹ Petitioners' guidelines "suggest methods of composing 'public prayer in a pluralistic society,' stressing 'inclusiveness and sensitivity' in the structuring of non-sectarian prayer. The guidelines do not suggest the elimination of references to a deity as appropriate." *Weisman*, 728 F. Supp. at 69.

American schoolchildren are taught that they have the constitutional right to speak. It is ironic that, at the threshold of their educational adulthood, the government is asked to publicly abridge that right and censor the very speech that celebrates their graduation. Such censorship is a far cry from what our forefathers envisioned when they wrote the document that would govern this nation and protect our most treasured freedoms. Indeed, Petitioner requests that this Court consider the effect of its decision in this case upon America's schoolchildren. As the dissenting circuit judge below has so poignantly observed:

If one were to ask people what are the problems of our time, they would hardly respond that our youth and their parents are being corrupted by over-exposure to noble aspirations of this character [Rabbi Gutterman's prayer]....So what good, one might ask, is accomplished by preventing an invocation like this? The answer, of course, is that we are also concerned to preserve the separation of church and state...yet the question remains, is it necessary—to preserve separation of church and state—to prevent benedictions and invocations of this generous, inclusive sort?"

Weisman, 908 F.2d at 1098 (Campbell, Circuit Judge, dissenting). Petitioners believe that the Constitution is quite clear: censorship is not necessary and no constitutional good will be accomplished by obliterating prayer from public school graduation ceremonies.

Therefore, on behalf of Petitioners, *amici curiae* respectfully request that this Court reverse the court below and deny the religious censorship Respondent seeks and that this Court duly recognize and reinvigorate the constitutional mandate that religious speech be treated equally with all other speech permitted in a limited public forum.

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IN THE
Supreme Court of the United States

October Term, 1990

ROBERT E. LEE, ET. AL.,

Petitioners,

v.

DANIEL WEISMAN, ETC.

Respondent.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF LIBERTY COUNSEL,
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OF THE PETITIONERS

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INTEREST OF AMICUS CURIAE¹

This case presents important issues pertaining to invocations and benedictions at public school promotion and graduation services. Even more importantly, the continuing validity of the three part *Lemon* test is questioned.

Liberty Counsel, based in Orlando, Florida, is a non-profit corporation organized to defend, restore, and preserve religious liberties. Since the *Lemon* test has spawned opinions for and against the constitutionality of graduation prayers, Liberty Counsel is faced with the dilemma of what advice to give on this issue. School boards, concerned parents and students often request legal opinions

¹Counsels of Record for Petitioners and Respondents have consented to the filing of this brief and their letters of consent have been filed with Clerk pursuant to Rule 37.

regarding graduation ceremonies. School boards have been sued for permitting and/or prohibiting such prayers. Students selected to present prayers at school ceremonies have been censored, and sometimes reprimanded, thereby suffering humiliation and emotional distress. Because of direct involvement in these issues, Liberty Counsel believes the expertise of its counsel in First Amendment litigation would be of assistance to this Court.

SUMMARY OF ARGUMENT

The *Lemon* test is inconsistent with the Establishment Clause and has precipitated chaos among lower courts; its subjective application should be abandoned. The subjectivity of the *Lemon* test results in chaotic lower court decisions and therefore should be abandoned. The *Lemon* test is not a comprehensive test by which the

Establishment Clause can be analyzed and is questionable as a helpful signpost or guideline and should be abandoned.

The original intent of the First Amendment was to allow freedom to worship as one pleased without government interference or oppression, thereby prohibiting government coercion or compulsion of belief or non-belief. The *Lemon* test undermines the original intent of the First Amendment and encourages favoritism toward those who do not believe to the detriment of those who do believe. History establishes the primary concern for adopting the Establishment Clause was that government would not be able to coerce religious adherence, enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience or accept any religious creed. Thus, the proper framework for Establishment Clause

analysis is a coercion standard. Utilization of a coercion standard would permit invocations and benedictions at public school graduation ceremonies.

I. THE LEMON TEST HAS PRECIPITATED CHAOS AMONG LOWER COURTS² AND ITS SUBJECTIVE APPLICATION SHOULD THEREFORE BE ABANDONED.

A. The Subjectivity Of The Lemon Test Results In Chaotic Lower Court Decisions And Therefore Should Be Abandoned.

The subjective nature of the *Lemon* test has resulted in chaotic, conflicting decisions in the lower courts. Among the areas effected are religion in the public schools, prayers, oaths and proclamations, public displays, state control over religious organizations, and miscellaneous areas such as religious holidays.

²The decisions presented in this section may not represent the final holdings but are cited as illustrations of the chaos caused among the lower courts by the *Lemon* test.

The *Lemon* test offers a rigid framework that lacks clear guidance. Highly subjective interpretations tend to inhibit government's accommodation of beliefs inherent in our nation's religious heritage. The secular purpose prong has never been fully defined. Courts are free to overlook articulated secular purposes in favor of the view that *anything* with a religious connotation can only have a religious purpose.³

Evidence that the primary effect of an act is neutral is largely ignored as courts focus instead on the secondary religious aspects when applying the

³See e.g., *Gilfillan v. City of Philadelphia*, 637 F.2d 924 (1980) (Expenditures for visit by Pope (head of state) violated the purpose prong because of his religious affiliation); *Greater Houston Chapter ACLU v. Eckels*, 589 F. Supp. 222 (S.D. Tex. 1984) (Erecting Crosses and Star of David was violative despite assertions of secular purpose).

effects prong.⁴ The paradoxical nature of the entanglement prong leads to subjective interpretations of what constitutes entanglement and of what is excessive.⁵

1. Religion in Public Schools

The state may not display a student painting with a religious theme in a school auditorium;⁶ but it may teach Biblical stories so that students can

⁴See e.g., *Americans United For Separation of Church & State v. Dunn*, 384 F. Supp. 714 (M.D. Tenn. 1974) (Tuition grants to colleges without restriction as to use violates second prong); *Friedman v. Board of County Commissioners*, 781 F.2d 777 (10th Cir. 1985) (Religious symbols on county seal violates second prong).

⁵Compare *Intercommunity Center for Justice & Peace v. Immigration & Naturalization Service*, 910 F.2d 42 (2d Cir. 1990) (regarding religious organization to comply with employer verification and sanctions of Immigration Reform and Control Act is not excessive entanglement), with *N.L.R.B. v. Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980) (N.L.R.B. order requiring religious school to recognize Union for lay faculty constitutes entanglement).

⁶*Joki v. Board of Education*, 745 F. Supp. 823 (N.D.N.Y. 1990).

appreciate art with Biblical themes.⁷ The Bible may not be read without comment,⁸ and it may⁹ or may not¹⁰ be taught in a course of instruction. Public school students may or may not distribute religious literature;¹¹ but Gideons may not.¹² Subjects of a religious nature may appear

⁷*Crockett v. Sorenson*, 1422 (W.D.Va. 1979); *Wiley v. Franklin*, 474 F. Supp. 525 (E.D. Tenn. 1979); *Wiley v. Franklin*, 468 F. Supp. 133 (E.D. Tenn. 1979).

⁸*Meltzer v. Board of Public Instruction*, 577 F.2d 311 (5th Cir. 1978); *Goodwin v. Cross County School District*, 394 F. Supp. 417 (E.D. Ark. 1973); *ACLU v. Wallace*, 331 F. Supp. 966 (M.D. Ala. 1971), *aff'd*, 456 F.2d 1069 (5th Cir. 1972); *Lynch v. Indiana State University Board of Trustees*, 378 N.E.2d 900 (Ind. App. 1978).

⁹See *supra* note 6; *Edwards v. Aguillard*, 482 U.S. 578 (1987).

¹⁰*Doe v. Human*, 725 F. Supp. 1499 (W.D. Ark. 1989); *Thompson v. Waynesboro Area School District*, 673 F. Supp. 1379 (M.D. Pa. 1987).

¹¹*Rivera v. East Otero School District R-1*, 721 F. Supp. 1189 (D. Colo. 1989) (May distribute religious literature); *Hernandez v. Hanson*, 430 F. Supp. 1154 (D. Neb. 1977) (May not distribute religious literature).

¹²*Meltzer v.*, 577 F.2d 311.

in a student newspaper, but only occasionally.¹³

School board policy transgresses the principle of government neutrality if it allows a Bible study,¹⁴ prayer club,¹⁵ fellowship group¹⁶ or religious class¹⁷ to meet on school premises. Courts split on whether a moment of silence may start the

¹³*Arrington v. Taylor*, 380 F. Supp. 1348 (M.D.N.C. 1974).

¹⁴*Trietley v. Board of Education*, 409 N.Y.S.2d 912 (1978).

¹⁵*Bender v. Williamsport Area School District*, 741 F.2d 538 (2d Cir. 1984); *Nartowicz v. Clayton County School District*, 736 F.2d 646 (11th Cir. 1984); *May v. Evansville-Vanderburgh School Corp.*, 615 F. Supp. 761 (S.D. Iowa. 1985); *Brandon v. Board of Education*, 487 F. Supp. 1219 (N.D.N.Y. 1980).

¹⁶*Garnett v. Renton School District No. 403*, 865 F.2d 1121 (9th Cir. 1989); *Nartowicz*, 736 F.2d 646; *Bell v. Little Axe Independent School District*, 766 F.2d 1391 (10th Cir. 1985); *Clark v. Dallas Independent School District*, 671 F. Supp. 1119 (N.D. Tex. 1987); but see *Board of Education v. Mergens*, 867 F.2d 1076 (8th Cir. 1989), *aff'd*, 110 S.Ct. 2356 (1990).

¹⁷*Ford v. Manuel*, 629 F. Supp. 771 (N.D. Ohio 1985); but see *Wallace v. Jaffree*, 472 U.S. 38 (1985).

school day.¹⁸

In school curriculum, health, family living, sex education, and reading programs with religious humanistic content objectionable to parents have been upheld,¹⁹ even where attendance was compulsory.²⁰ Yet, statutes permitting

¹⁸*Walter v. West Virginia Board of Education*, 610 F. Supp. 1169 (D. W.Va. 1985); *May v. Cooperman*, 572 F. Supp. 1561 (D.N.J. 1983) (Moment of silence unconstitutional); *Duffy v. Las Cruces Public Schools*, 557 F. Supp. 1013 (D.N.M. 1983) (Moment of silence is unconstitutional); *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976) (Moment of silence is constitutional); cf. *Kent v. Commissioner*, 402 N.E.2d 1340 (Mass. 1980) (Voluntary moment of prayer by student volunteer unconstitutional).

¹⁹*Grove v. Mead School District. No. 354*, 753 F.2d 1528 (9th Cir. 1985); *Citizens for Parental Rights v. San Mateo County Board of Education*, 124 Cal. Rptr. 68 (1975); see also *Mozert v. Hawkins County Public Schools*, 647 F. Supp. 1194 (E.D. Tenn. 1986); *Smith v. Ricci*, 89 N.J. 514, 446 A.2d 501 (1982).

²⁰*Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974); *Hopkins v. Hamden Board of Education*, 29 Conn. Supp. 397, 289 A.2d 914 (1971); *Smith v. Ricci*, 446 A.2d at 501. But see, *Smith v. Board of School Commissioners*, 655 F. Supp. 939 (S.D. Ala. 1987); cf. *Malnak v. Yogi*, 592 F.2d 197

teaching concerning the non-evolutionary origins of life have been stricken.²¹

In the area of release time, students were allowed to go off school premises for religious instruction;²² but the instruction could not take place near the school building,²³ students could not hand-carry attendance slips,²⁴ and elective credit could not be given for the course.²⁵

(3d Cir. 1979) (Elective "Science of Creative Intelligence-TM" in school violates Establishment Clause); *Smith v. Smith*, 523 F.2d 121 (4th Cir. 1975); *State v. Thompson*, 66 Wis. 2d 659, 225 N.W. 2d 678 (1975).

²¹*Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975); *Aguillard v. Treen*, 634 F. Supp. 426 (E.D. La. 1985); *McLean v. Arkansas Board of Education*, 529 F. Supp. 1255 (E.D. Ark. 1982); *Steele v. Waters*, 527 S.W.2d 72 (Tenn. 1975).

²²*Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981); *Smith*, 523 F.2d 121; *Thompson*, 225 N.W.2d 678.

²³*Doe v. Shenandoah County School Board*, 737 F. Supp. 913 (W.D. Va. 1990).

²⁴*Lanner*, 662 F.2d 1349; *Thompson*, 225 N.W.2d 678.

²⁵*Lanner*, 662 F.2d 1349; See *Minnesota Federation of Teachers v. Nelson*, 740 F. Supp. 694 (D. Minn. 1990).

Yet, public school intercoms were permitted in seminary classrooms and public schools could maintain mailboxes for seminary instructors.²⁶ Schools have been forced to defend the recognition of religious observances²⁷ and prohibition of school dances.²⁸

2. Education In General

A parochial school child can participate in a public school band course;²⁹ but cannot participate in an all-

²⁶*Id.*

²⁷See *Florey v. Sioux Falls School District 49-5*, 619 F.2d 1311 (8th Cir. 1980). See also *Student Members of Playcrafters v. Board of Education*, 424 A.2d 1192 (N.J. 1981) (School board forced to defend policy of prohibiting extracurricular activities on Friday, Saturday, and Sunday).

²⁸See *Clayton v. Place*, 884 F.2d 376 (8th Cir. 1989).

²⁹*Snyder v. Charlotte Public School District*, 421 Mich. 517, 365 N.W.2d 151 (1985).

county band.³⁰ If a parochial school child needs remedial services, the district may be allowed to fund services at the student's school;³¹ but such provision may be void on its face,³² or funds may be allowed only if services are performed at "neutral sites".³³

Public funds may be used to lease classroom space from a church related school, but only if public school children are shielded from religious influence.³⁴

³⁰*Thomas v. Allegheny County Board of Education*, 51 Md. App. 312, 443 A.2d 622 (1982).

³¹See *Walker v. San Francisco Unified School District*, 741 F. Supp. 1386 (N.D. Cal. 1990); *Thomas v. Schmidt*, 397 F. Supp. 203 (D. R.I. 1975).

³²*Wamble v. Bell*, 598 F.Supp 1356 (W.D. Mo. 1984); *Viss v. Pittenger*, 345 F.Supp. 1349 (E.D. Pa. 1972).

³³*Felton v. Secretary*, 739 F.2d 48 (2d Cir. 1984); *Pulido v. Cavasos*, 728 F. Supp. 574 (W.D. Mo. 1989); *Filler v. Port Washington University Free School District*, 436 F. Supp. 1231 (E.D.N.Y. 1977); *Wolman v. Essex*, 417 F. Supp. 1113 (S.D. Ohio 1976).

³⁴*Schmidt*, 397 F. Supp. 203.

Public schools may³⁵ or may not³⁶ lease classroom space in parochial schools. Private school students or religious organizations may³⁷ or may not³⁸ be

³⁵*Spacco v. Bridgewater School Department*, 722 F. Supp. 834 (D. Mass. 1989); *Americans United for Separation of Church & State v. Paire*, 359 F. Supp. 505 (D.N.H. 1973); *Americans United for Separation of Church & State v. Paire*, 348 F. Supp. 506 (D.N.H. 1972); *Citizens to Advance Public Education v. Porter*, 237 N.W.2d 232 (Mich. 1976) (Shared time secular education program).

³⁶See *supra* note 31; See also *Americans United for Separation of Church & State v. School District of Grand Rapids*, 546 F. Supp. 1071 (W.D. Mich. 1982); *Americans United for Separation of Church & State v. Porter*, 485 F. Supp. 432 (W.D. Mich. 1980); *Americans United for Separation of Church & State v. Board of Education*, 369 F. Supp. 1059 (E.D. Ky. 1974).

³⁷*Gregoire v. Centennial School District*, 907 F.2d 1366 (3d Cir. 1990); *Parents Association of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986); *Country Hills Christian Church v. Unified School District*, 560 F. Supp. 1207 (D. Kan. 1983); *Resnick v. East Brunswick Township Board of Education*, 389 A.2d 944 (N.J. 1978); cf. *Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980) (University must allow recognized student organizations to use school facilities for religious purposes).

permitted to utilize public school facilities. When sectarian students were to receive remedial services at a public school, parents objected believing the segregation was an unconstitutional advancement of religion and would cause feelings of inferiority.³⁹

Tuition tax breaks have generally been found to form an "unconstitutional bridge between church and state."⁴⁰

³⁸*Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982); *Lamb's Chapel vs. Center Moriches School District*, 736 F. Supp. 1247 (E.D.N.Y. 1990); *Resnick v. East Brunswick Township Board of Education*, 135 N.J. Super. 257, 343 A.2d 127 (1975); cf. *Wallace v. Washoe County School Board*, 701 F. Supp. 187 (D. Nev. 1988); *Ford v. Manuel*, 629 F. Supp. 771 (N.D. Ohio 1985).

³⁹*Parents Association of P.S. 16*, 803 F.2d 1235.

⁴⁰*Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980); see also *Public Funds for Public Schools v. Byrne*, 590 F.2d 514 (3d Cir. 1979); *Kosydar v. Wolman*, 353 F. Supp. 744 (S.D. Ohio 1972); But see *Minnesota Civil Liberties Union v. Roemer*, 452 F. Supp. 1316 (D. Minn. 1978).

Financial assistance programs for needy students attending private schools have failed the effects prong.⁴¹ Some courts have disqualified private school college students from receiving government tuition grants,⁴² while other courts have allowed such grants.⁴³ Some plans were upheld only

⁴¹*Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio 1972); *People v. Howlett*, 305 N.E.2d 129 (Ill. 1973); *Weiss v. Bruno*, 82 Wash.2d 199, 509 P.2d 973 (1973); contra *Barrera v. Wheeler*, 475 F.2d 1338 (8th Cir. 1973).

⁴²See *d'Errico v. Lesmeister*, 570 F. Supp. 158 (D.N.D. 1983); *Smith v. Board of Governors*, 429 F. Supp. 871 (D.N.C. 1977); *Americans United for Separation of Church & State v. Dunn*, 384 F. Supp. 714 (M.D. Tenn. 1974); *Americans United for Separation of Church & State v. Bubb*, 379 F. Supp. 872 (D. Kan. 1974); *Opinion of the Justices*, 280 So.2d 547 (Ala. 1973); *State v. Swanson*, 102 Neb. 125, 219 N.W.2d 727 (1974). But cf. *Durham v. McLeod*, 192 S.E.2d 202 (S.C. 1972) (Loans constitutional).

⁴³See *Americans United for Separation of Church & State v. Blanton*, 433 F. Supp. 97 (M.D. Tenn. 1977); *Lendall v. Cook*, 432 F. Supp. 971 (D. Ark. 1977); *American United for Separation of Church & State v. Rogers*, 538 S.W.2d 711 (Mo. 1976); See *Cecrle v. Illinois Educational Facilities Authority*, 288 N.E.2d 402 (Ill. 1972).

where the use of the funds was restricted.⁴⁴ Students may receive grants to study philosophy or religion in public schools but not theology in pervasively sectarian schools failing a 36 prong test.⁴⁵ Veteran's Administration and some handicap tuition assistance programs have generally been held valid for recipients attending sectarian schools.⁴⁶

⁴⁴See *Walker v. San Francisco Unified School District*, 741 F. Supp. 1386 (N.D. Cal. 1990); *Lendall*, 432 F. Supp. 971; *Smith*, 429 F. Supp. 871; *Americans United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072 (Colo. 1982).

⁴⁵See *Minnesota Federation of Teachers v. Nelson*, 740 F. Supp. 694 (D. Minn. 1990); But cf. *In Re Dickerson*, 474 A.2d 30 (N.J. 1983) (Testamentary scholarships for ministry students at public institute constitutional).

⁴⁶*Witters v. Washington Department of Service of the Blind*, 474 U.S. 481 (1986); *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D. S.C. 1974).

States may provide bus transportation to private school children,⁴⁷ but in Rhode Island, the enabling statute was stricken three times.⁴⁸ Public funds cannot be used to provide textbooks to private school students in some states,⁴⁹ but in others,

⁴⁷*Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980) (Provision valid but not severable); *Cromwell Property Owners Association v. Toffolon*, 495 F. Supp. 915 (D. Conn. 1979); *Board of Education v. Bakalis*, 54 Ill.2d 448, 299 N.E.2d 737 (1973); *State v. School District*, 320 N.W.2d 472 (Neb. 1982); *Springfield School District v. Department of Education*, 397 A.2d 1154 (Pa. 1979); cf. *Americans United for Separation of Church & State v. Benton*, 413 F. Supp. 955 (S.D. Iowa 1975) (No cross-district transport).

⁴⁸*Members of Jamestown School Committee v. Schmidt*, 699 F.2d 1 (1st Cir. 1983); *Members of Jamestown School Committee v. Schmidt*, 525 F. Supp. 1045 (D.R.I. 1981); *Members of Jamestown School Committee v. Schmidt*, 427 F. Supp. 1338 (D.R.I. 1977).

⁴⁹*California Teachers Association v. Riles*, 632 P.2d 953 (Cal. 1981); *Mallory v. Barrera*, 544 S.W.2d 556 (Mo. 1976); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974); contra *Elbe v. Yankton Independent School District No. 1*, 714 F.2d 848 (8th Cir. 1983); *Wolman v. Essex*, 417 F. Supp. 1113 (S.D. Ohio 1976); *Cunningham v. Lutjeharms*, 231 Neb. 756, 437 N.W.2d 806

it is acceptable for the state to reimburse parochial schools for textbook expenditures.⁵⁰ Decisions also limit the provision of educational materials to sectarian schools.⁵¹ Tax deductions to parents for textbooks and transportation for children attending any school have been stricken because of the potential for excessive entanglement.⁵² In some cases states may not reimburse a sectarian school for costs incurred performing state mandated tasks, such as testing and

(Neb. 1989).

⁵⁰*Americans United for Separation of Church & State v. Paire*, 359 F. Supp. 505 (D.N.H. 1973); *Pennsylvania Department of Education v. The First School*, 348 A.2d 458 (Pa. 1975).

⁵¹*Americans United for Separation of Church & State v. Oakey*, 339 F. Supp. 545 (D. Vt. 1972); But see *Wolman*, 417 F. Supp. 1113.

⁵²*Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980).

record-keeping,⁵³ but in other cases it is permissible.⁵⁴

3. State Control Over Religious Organizations

State regulation of private schools regarding compulsory attendance,⁵⁵ teacher certification,⁵⁶ and curriculum⁵⁷ have been

⁵³*Committee for Public Education & Religious Liberty v. Levitt*, 342 F. Supp. 439 (S.D.N.Y. 1972).

⁵⁴*Committee for Public Education & Religious Liberty v. Levitt*, 461 F. Supp. 1123 (S.D.N.Y. 1978); *Thomas*, 397 F. Supp. 203.

⁵⁵*Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8th Cir. 1987); *Attorney General v. Bailey*, 436 N.E.2d 139 (Mass. 1982); *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980).

⁵⁶*Fellowship Baptist Church*, 815 F.2d 486; But cf. *Bangor Baptist Church v. State*, 549 F. Supp. 1208 (D. Me. 1982); *Johnson v. Charles City Community Schools Board of Education*, 368 N.W.2d 74 (1985); *Sheridan Road Baptist Church v. Department of Education*, 348 N.W.2d 263 (Mich. 1984); *State v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981). cf. *State v. Anderson*, 427 N.W.2d 316 (N.D. 1988) (Home schooling parents violated teacher certification requirements).

upheld. State employees may not teach or provide remedial services in private schools,⁵⁸ but may visit classrooms to observe both secular and religious teaching, suggest teacher replacements, and review accreditation.⁵⁹ However, student teachers may not receive credit for teaching at parochial schools.⁶⁰

⁵⁷*New Life Baptist Church Academy v. East Longmeadow*, 885 F.2d 952 (1st Cir. 1989); *Sheridan Road Baptist Church v. Department of Education*, 348 N.W. 2d 263 (Mich. 1984); *State v. Faith Baptist Church*, 301 N.W.2d 571 (1981); cf. *New Jersey State Board of Higher Education v. Board of Directors*, 448 A.2d 988 (N.J. 1982) (Prohibiting conferring of degree by unlicensed institution applied to a sectarian college whose religious doctrine precluded state licensure).

⁵⁸*Pulido v. Cavazos*, 728 F. Supp. 574 (W.D. Mo. 1989); *Wamble*, 598 F. Supp. 1356; *Americans United for Separation of Church & State v. Porter*, 485 F. Supp. 432 (W.D. Mich. 1980); *Americans United for Separation of Church & State v. Board of Education*, 369 F. Supp. 1059 (E.D. Ky. 1974); but see *Walker v. San Francisco United School District*, 741 F. Supp. 1386 (N.D. Cal. 1990).

⁵⁹*New Life Baptist*, 885 F.2d 952.

⁶⁰*Stark v. St. Cloud State University*, 802 F.2d 1046 (8th Cir. 1986).

State inquiry into a religious organization's operating costs violates the Establishment Clause,⁶¹ unless requested by the Internal Revenue Service.⁶² The state may enforce compliance with minimum wage laws,⁶³ the Fair Labor Standards Act,⁶⁴ and force participation in

⁶¹*Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979); *Fernandez v. Lima*, 465 F. Supp. 493 (N.D. Tex. 1979). See also *Heritage Village Church & Missionary Fellowship v. State*, 263 A.2d 726 (N.C. 1980) (Act requiring only certain religious groups to file information is unconstitutional).

⁶²*United States v. Freedom Church*, 613 F.2d 1316 (1st Cir. 1979); *Lutheran Social Service v. United States*, 583 F. Supp. 1298 (D. Minn. 1984); cf. *Hernandez v. Commissioner*, 819 F.2d 1212 (1st Cir. 1987); *St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958 (S.D.N.Y. 1989) (State inquiry into church records does not violate entanglement prong).

⁶³*Archbishop of Roman Catholic Apostolic Archdiocese v. Guardiola*, 628 F. Supp. 1173 (D.P.R. 1985); *Donovan v. Shenandoah Baptist Church*, 573 F. Supp. 320 (W.D. Va. 1983).

⁶⁴*Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990); *E.E.O.C. v. Freemont Christian School*, 781 F.2d 1362 (9th Cir. 1986); *Ninth & O St. Baptist Church v. E.E.O.C.*, 616 F. Supp. 1231 (W.D. Ky. 1985); *Russell v. Belmont*

FICA and FUTA,⁶⁵ despite an organization's religious beliefs to the contrary. The National Labor Relations Board may not be applicable to parochial schools,⁶⁶ but a

1982).

⁶⁵*South Ridge Baptist Church v. Industrial Commission*, 911 F.2d 1203 (6th Cir. 1990) (Church included within workers' compensation system); *Bethel Baptist Church v. United States*, 822 F.2d 1334 (3d Cir. 1987); *Young Life v. Division of Employment & Training*, 650 P.2d 515 (Colo. 1982) (Religious organization subject to unemployment tax); *Baltimore Lutheran High School Association v. Employment Security Administration*, 490 A.2d 701 (Md. 1985) (School subject to unemployment tax); *Contra Grace Lutheran Church v. North Dakota Employment Security Bureau*, 294 N.W. 767 (N.D. 1980) (Church not subject to unemployment tax); *The Christian Jew Foundation v. State*, 353 S.W.2d 607 (Tex. 1983) (Organization exempt from unemployment tax); *Community Lutheran School v. Iowa Department of Job Service*, 326 N.W.2d 286 (Iowa 1982) (School exempt from unemployment tax).

⁶⁶*Universidad v. N.L.R.B.*, 793 F.2d 383 (1st Cir. 1985); see also *N.L.R.B. v. Salvation Army*, 763 F.2d 1 (1st Cir. 1985); *N.L.R.B. v. Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980); *Catholic Bishop v. N.L.R.B.*, 559 F.2d 1112 (2d Cir. 1977); *McCormick v. Hirsh*, 460 F. Supp. 1337 (M.D. Pa. 1978); contra *N.L.R.B. v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981); *Grutka v. Barbour*, 549 F.2d 5 (7th Cir. 1977).

state labor board may have jurisdiction.⁶⁷ Sectarian schools are prohibited from utilizing CETA workers.⁶⁸ Civil rights statutes have not been enforced against religious organizations,⁶⁹ but courts have split as to whether the "reasonable accommodation" requirement may be enforced

⁶⁷*Goldsborough Christian Schools, Inc. v. United States*, 436 F. Supp. 1314 (E.D.N.C. 1977); cf. *Catholic High School Association v. Culvert*, 753 F.2d 1161 (2d Cir. 1985).

⁶⁸*Decker v. O'Donnell*, 663 F.2d 598 (7th Cir. 1980) (CETA created entanglement); see also, *Decker v. Department of Labor*, 473 F. Supp. 770 (E.D. Wis. 1979).

⁶⁹*Dayton Christian Schools v. Ohio Civil Rights Commission*, 766 F.2d 932 (6th Cir. 1985); *Cochran v. St. Louis Preparatory Seminary*, 717 F. Supp. 1413 (E.D. Mo. 1989); *Maguire v. Marquette University*, 627 F. Supp. 1499 (E.D. Wis. 1986); *E.E.O.C. v. Southwestern Baptist Theological Seminary*, 485 F. Supp. 255 (N.D. Tex. 1980); *E.E.O.C. v. Mississippi College*, 451 F. Supp. 564 (S.D. Miss. 1978); contra *Dolter v. Wahlert High School*, 483 F. Supp. 266 (N.D. Iowa 1980); *McLeod v. Providence Christian School*, 408 N.W.2d 146 (Mich. 1987); but see *E.E.O.C. v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982).

against secular employees.⁷⁰

Two entanglement triangles arise in the provision of child care. First, the state may purchase child care services from religiously affiliated organizations⁷¹ and may consider the religious preference of the parents for placement,⁷² but the agency cannot impose its religious

⁷⁰*Protos v. Volkswagon of America, Inc.*, 797 F.2d 129 (3d Cir. 1986); *Nottleson v. Smith Steel Workers*, 643 F.2d 445 (7th Cir. 1981); *E.E.O.C. v. Jefferson Smurfit Corp.*, 724 F. Supp. 881 (M.D. Fla. 1989); *Gavin v. Peoples Natural Gas Co.*, 464 F. Supp. 622 (W.D. Pa. 1979); *Michigan Department of Civil Rights v. General Motors*, 317 N.W. 16 (Mich. 1982); *American Motors Corp. v. Department of Industry, Labor, & Human Relations*, 286 N.W.2d 847 (Wis. 1978).

⁷¹*Wilder v. Bernstein*, 848 F.2d 1338 (2d Cir. 1988).

⁷²*Id.* cf. *Dickens v. Ernesto*, 281 N.E.2d 153 (N.Y. 1982) (Religious affiliation requirements in adoption proceeding constitutional); *Bonjour v. Bonjour*, 592 P.2d 1233 (Alaska 1979) (Statute specifying religious needs of child upheld); *Zucco v. Garrett*, 501 N.E.2d 875 (Ill. 1986) (Awarding custody based on religious practices is abuse of discretion).

doctrine upon a child.⁷³ Second, religious child care facilities exempted from licensure may or may not be deemed to fail the *Lemon* test.⁷⁴ Church-run day care centers are subject to zoning restrictions,⁷⁵ but a city may not exempt

⁷³*Arneth v. Gross*, 699 F. Supp. 450 (S.D.N.Y. 1988).

⁷⁴*Forest Hills Early Learning Center v. Lukhard*, 728 F.2d 230 (4th Cir. 1984); *Forte v. Colder*, 725 F. Supp. 488 (M.D. Fla. 1989); see *The Corpus Christi Baptist Church, Inc. v. Texas Department of Human Resources* 481 F. Supp. 1101 (S.D. Tex. 1979); *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988); *North Valley Baptist Church v. McMahon*, 696 F. Supp. 578 (E.D. Cal. 1988); *Cohen v. City of Des Plaines*, 742 F. Supp. 458 (N.D. Ill. 1990); *State v. Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d 692 (Tex. 1984); *State Department of Social Services v. Emmanuel Baptist Pre-School*, 455 N.W.2d 1 (Mich. 1990); *Pre-School Owner's Association v. Department of Children & Family Services*, 518 N.E.2d 1018 (Ill. 1988); *Arkansas Day Care Association, v. Clinton*, 577 F. Supp. 388 (E.D. Ark. 1983). cf. *State v. McDonald*, 787 P.2d 466 (Okla. 1989) (Religious affiliated "boy's ranch" subject to state licensing requirements).

⁷⁵*First Assembly of God v. City of Alexandria*, 739 F.2d 942 (4th Cir. 1984).

them from requirements imposed upon commercial operators.⁷⁶

4. Prayers, Oaths and Proclamations⁷⁷

Invocations may open public meetings,⁷⁸ but not a high school football game⁷⁹ or assembly⁸⁰ and a judge may not open his daily sessions with a brief prayer.⁸¹

Resolutions and proclamations urging days of prayer have been challenged and

⁷⁶Cohen, 742 F. Supp. 458; cf. *Arkansas Day Care Association*, 577 F. Supp. 388 (Statute disparately treated religious facilities).

⁷⁷Because this Court has been thoroughly briefed by the parties on this issue, only a brief analysis is presented here.

⁷⁸*Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979); *Marsa v. Wernick*, 430 A.2d 888 (N.J. 1981); *Lincoln v. Page*, 241 A.2d 799 (N.H. 1968).

⁷⁹*Jager v. Douglas County School District*, 862 F.2d 824 (11th Cir. 1989).

⁸⁰*Collins v. Chandler Unified School District*, 644 F.2d 759 (9th Cir. 1981).

⁸¹*North Carolina Civil Liberties Union v. Constangy*, No. C-C-89-438-M (W.D. N.C. Oct. 18, 1990).

upheld,⁸² but a "motorist's prayer" may not be printed on the back of a state road map.⁸³

5. Public Displays

Despite widely held religious beliefs and the historical significance of Christmas, the *Lemon* test makes upholding religiously oriented Christmas decorations a juggling act. The following may not be displayed on public grounds: Nativity scenes, paintings depicting scenes from the life of Christ, signs reading "Keep Christ in Christmas", and crosses.⁸⁴

⁸²*Zwerling v. Reagan*, 576 F. Supp. 1373 (C.D. Cal. 1983); *Allen v. Consolidated City of Jacksonville*, 519 F. Supp. 1532 (M.D. Fla. 1989).

⁸³*Hall v. Bradshaw*, 630 F.2d 1018 (4th Cir. 1980); *Citizens Concerned for Separation of Church & State v. Denver*, 508 F. Supp. 823 (D. Colo. 1981).

⁸⁴*American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1981); *ACLU v. City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986); *ACLU v. County of Delaware*, 726 F. Supp. 184 (S.D. Ohio 1989); *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973); *Burelle v. City of Nashua*, 599 F. Supp. 792 (D.N.H. 1984); *Citizens*

However, a menorah may be placed on public property during Hanukkah.⁸⁵ Courts are split over whether government may participate in Christmas celebrations

Concerned for Separation of Church & State v. Denver, 526 F. Supp. 1310 (D. Colo. 1989); *Citizens Concerned for Separation of Church & State v. City & County of Denver*, 481 F. Supp. 522 (D. Colo. 1979); see also *Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990); *Smith v. Linstrom*, 699 F. Supp. 549 (W.D. Va. 1988); *Conrad v. Denver*, 656 P.2d 662 (Colo. 1982); cf. *ACLU v. Wilkinson*, 895 F.2d 1098 (6th Cir. 1990) (Rustic stable); contra *Mather v. Village of Mundelin*, 864 F.2d 1291 (7th Cir. 1989); *Citizens Concerned for Separation of Church & State v. City & County of Denver*, 508 F. Supp. 823 (D. Colo. 1979); but cf. *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984) (Nativity scenes); *Doe v. Small*, 726 F. Supp. 713 (N.D. Ill. 1989) (Paintings of Christ); *Goldstein v. Fire Department*, 559 F. Supp. 1389 (S.D.N.Y. 1983) (Signs); see also *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986); *ACLU of Mississippi v. Mississippi State General Services Administration*, 652 F. Supp. 380 (S.D. Miss. 1987) (Crosses); *Libin v. Town of Greenwich*, 625 F. Supp. 393 (D. Conn. 1985).

⁸⁵*Kaplan v. City of Burlington*, 700 F. Supp. 1315 (D. Vt. 1988).

having any element of religion.⁸⁶

Courts are divided over whether the state may⁸⁷ or may not⁸⁸ erect a cross as a war memorial. Where a state exercised eminent domain over a cemetery, a court prohibited the state from erecting crosses and a statue of Jesus, but allowed the state to provide and erect religious markers chosen by the descendants.⁸⁹ Crosses placed on government property have generally been prohibited;⁹⁰ but crosses

⁸⁶*Allen v. Morton*, 495 F.2d 65; *Society of Separationists, Inc. v. Clements*, 677 F. Supp. 509 (W.D. Tex. 1988); *Greater Houston Chapter of ACLU v. Eckels*, 589 F. Supp. 222 (M.D. Tex. 1984).

⁸⁷*Eugene Sand & Gravel, Inc. v. Eugene*, 276 Or. 1007, 558 P.2d 338 (1976).

⁸⁸*Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988).

⁸⁹*Birdine v. Moreland*, 579 F. Supp. 412 (N.D. Ga. 1983).

⁹⁰*Mendelson v. City of St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989); *Hewitt v. Joyner*, 705 F. Supp. 1443 (C.D. Cal. 1989); *ACLU v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886 (N.D. Ga. 1981); *Fox v. City of Los Angeles*, 587 P.2d 663 (Cal. 1978).

and religious symbols on official seals may or may not be permissible.⁹¹

The Ten Commandments have been removed from schools,⁹² but permitted to remain on other public property.⁹³ A legislature may designate a room for prayer and meditation, but religious decorations or use of the room may be prohibited.⁹⁴

6. Miscellaneous

An order of then Governor Reagan giving state employees a three hour paid

⁹¹*Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987); *Friedman v. Board of City Commissioners*, 781 F.2d 777 (10th Cir. 1985); *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989); *Harris v. City of Zion*, 729 F. Supp. 1242 (N.D. Ill. 1990); *Johnson v. Board of County Commissioners*, 528 F. Supp. 919 (D.N.M. 1981); *Murray v. City of Austin*, 744 F. Supp. 771 (W.D. Tex. 1990).

⁹²*Ring v. Grand Forks Public School District*, 483 F. Supp. 272 (D.N.D. 1980).

⁹³*Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1972).

⁹⁴*Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988).

holiday on Good Friday violated the Establishment Clause,⁹⁵ but a school district was permitted to designate Good Friday a paid holiday in conjunction with a Union Contract.⁹⁶

Religion has been put on the defensive by forcing it to assume a cloak of secularism. Adherence to the *Lemon* test has forced courts to make decisions based on minute quantifiable details reminiscent of the "legalistic minuet" warned against in *Lemon* itself. *Lemon*, 403 U.S. at 614.

B. The *Lemon* Test Is Not A Comprehensive Test By Which The Establishment Clause Can Be Effectively Analyzed And Is Questionable As A Helpful Signpost Or Guideline And Should Be Abandoned.

⁹⁵*Mandel v. Hodges*, 54 Cal.App.3d 596 (1976).

⁹⁶*California School Employees Association v. Sequoia Union High School District*, 67 Cal.App.3d 157 (1977); cf. *Cammack v. Waihee*, 673 F. Supp. 1524 (D. Haw. 1987) (State may declare Good Friday a legal holiday).

Chief Justice Rehnquist has stated that "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower Federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v Davis*, 454 U.S. 370, 375 (1982). This Court must articulate a clearly defined standard which the lower courts can follow with confidence.

Despite this Court's subsequent description of the test as only a "guideline", *Committee For Public Education v. Nyquist*, 413 U.S. 756 (1973), and "no more than a useful signpost", *Mueller v. Allen*, 436 U.S. 388, 394 (1983), citing *Hunt v. McNair*, 413 U.S. 734, 741 (1973), the test has been used by the lower courts in deciding virtually all

Establishment Clause cases. Instead of being a guideline for the Establishment Clause, the *Lemon* test has become the Establishment Clause. See *Murray v. City of Austin*, 744 F. Supp. 771 (W.D. Tex. 1990).⁹⁷ The lower courts are compelled to apply the test in Establishment Clause cases, even where they feel injustice may be done.⁹⁸ This is true although this Court has indicated its intention not to be bound to one test and has recognized other standards. See, *Marsh v. Chambers*, 463 U.S. 783 (1983); *Larson v. Valente*, 456 U.S. 228 (1982).

II. THE ORIGINAL INTENT OF THE FIRST AMENDMENT WAS TO ALLOW FREEDOM TO WORSHIP AS ONE PLEASED WITHOUT GOVERNMENT

⁹⁷("Under *Lemon*, ... [t]he First Amendment is violated if any of the three prongs of the test are violated.") (citing *County of Allegheny v. ACLU*, 109 S.Ct. 3086 (1989)).

⁹⁸See *ACLU v. County of Delaware*, 726 F. Supp 184 (S.D. Ohio 1989) (Nativity scene violates Establishment Clause, "nevertheless this Court reaches its decision in this case with considerable regret").

INTERFERENCE OR OPPRESSION, THEREBY
PROHIBITING GOVERNMENT COERCION OR
COMPULSION OF BELIEF OR NON-BELIEF.

A. The Lemon Test Undermines The
Original Intent Of The First
Amendment And Encourages Favoritism
Toward Those Who Do Not Believe To
The Detriment Of Those Who Do
Believe.

Oliver Wendell Holmes' statement is
apropos: "A page of history is worth a
volume of logic." *New York Trust Co. v.*
Eisner, 256 U.S. 345, 349 (1921). The
best interpretation of the First Amendment
is one that is "illuminated by history".
Lynch v. Donnelly, 465 U.S. 668, 678
(1984); *Walz v. Tax Commission*, 397 U.S.
664, 671 (1970). This Court has noted the
following in this respect:

In applying the First Amendment to
the states through the 14th
Amendment, *Cantwell v. Connecticut*, 310
U.S. 296 (1940), it would be
incongruous to interpret that clause
as imposing more stringent First
Amendment limits on the states than
the draftsmen imposed upon the
Federal Government.

Marsh, 463 U.S. at 790-91. Therefore, the
historical context of the First Amendment
is crucial to a proper resolution of this
case.

As the first act of the Continental
Congress in 1774, the Rev. Mister Duche
opened with prayer and read from Psalm
31.⁹⁹ From its inception Congress and
state legislatures have begun their

⁹⁹Mr. Duche's prayer was as follows:
Be Thou present O God of Wisdom and direct
the council of this honorable assembly;
enable them to settle all things on the
best and surest foundations; that the
scene of blood may be speedily closed;
that order, harmony, and peace may be
effectually restored, and truth and
justice, religion and piety, prevail and
flourish among the people. Preserve the
health of their bodies, and the vigor of
their minds, shower down on them, and the
millions they represent, such temporal
blessings as Thou seest expedient for them
in this world, and crown them with
everlasting glory in the world to come.
All this we ask in the name and through
the merits of Jesus Christ Thy Son and our
Saviour. AMEN.

sessions with an invocation by a paid Chaplain. *Marsh*, 463 U.S. at 787-89. See *Lynch*, 465 U.S. at 673-74. Courts have historically opened their daily proceedings with the invocation "God save the United States and this Honorable Court." *Marsh*, 463 U.S. at 786. Even this Court has Moses and the Ten Commandments inscribed above the bench recognizing the Biblical foundations of our legal heritage.¹⁰⁰

George Washington began the tradition of taking the Presidential oath of office upon the Bible. When he assumed office in 1789, he stated, "it would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the Universe..." *Engel v. Vitale*, 370 U.S. 421, 466 (Stewart, J., dissenting). An

¹⁰⁰See *Lynch*, 465 U.S. at 677.

impressive list of presidents subsequent to Washington have invoked the protection and help of Almighty God. *Engel*, 370 U.S. at 446-449.

James Madison, the father of the Bill of Rights, was a member of the Congressional committee that recommended the Chaplaincy system. H.R. Rp. No. 124, 33rd Cong., 1st Sess. (1789), *Reprinted in 2 No. 2 Reports of Committees of the House of Representatives* 4 (1854). Madison voted for the bill authorizing payment of chaplains. 1 *Annals of Cong.* 891 (J. Gales ed. 1834). Rev. Wm. Linn was elected Chaplain of the House of Representatives and paid \$500 from the federal treasury.

September 25, 1789, the day the final agreement was made on the Bill of Rights, the House requested President Washington proclaim a day of Thanksgiving to acknowledge "the many signal favors of

Almighty God." H.R. Jour., 1st Cong., 1st Sess., 123 (1826 ed.); S. Jour., 1st Cong., 1st Sess., 88 (1820 ed.); Lynch, 465 U.S. at 675 n.2. He proclaimed November 26, 1789, a day of Thanksgiving to offer "our prayers and supplications to the great Lord and ruler of nations, and beseech Him to pardon our national and other transgressions." *Id.* Later President Madison issued four Thanksgiving Day proclamations, July 9, 1812, July 23, 1813, November 16, 1814 and March 4, 1815. R. Cord, *Separation of Church & State* 31 (1982). Successive presidents have continued this tradition.

B. History Establishes The Primary Concern For Adopting The Establishment Clause That Prohibits Government From Intentionally, Either Through Coercion Or Compulsion, Compromising Religious Beliefs Or Choice.

"The line we must draw between the permissible and impermissible is one which

accords with history and faithfully reflects the understanding of the Founding Fathers." *School District of Abington Township of Pennsylvania v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring). The historical setting of the Establishment Clause is often reviewed to ensure this Court's interpretation "comport[s] with what history reveals was the contemporaneous understanding of its guarantees." *Lynch* at 673. See also *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Walz v. Tax Commissions*, 397 U.S. 664 (1970); *Marsh v. Chambers*, 463 U.S. 783 (1983). When the First Amendment was adopted it prohibited the federal government from coercively intruding into religion. "Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our

political and cultural heritage." *County of Allegheny v. American Civil Liberties Union*, 109 S.Ct. 3086, 3135 (Kennedy, J., concurring in part and dissenting in part).

History, therefore, mandates the *Lemon* test be replaced by the coercion standard. An acceptable standard would proscribe government activity that intentionally, either through coercion or compulsion, results in compromising the student's religious beliefs or choice.¹⁰¹ This coercion standard comports with the original intent presupposed in the adoption of the Establishment Clause.

The coercion standard has, at least implicitly, been recognized and applied by this Court in several cases. Concerning the issue of release time, this Court

¹⁰¹For further discussion and analysis of a similar standard see Choper, *Religion in the Schools*, 47 Minn. L. Rev. 329 (1963).

recognized

[w]e are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any

person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction.

Zorach v. Clauson, 343 U.S. 306, 313-14 (emphasis added).

Prior to *Zorach*, this Court acknowledged "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction" *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925) (emphasis added). This Court has consistently applied the coercion standard in invalidating government actions furthering religious interests through either government coercion or compulsion.¹⁰²

¹⁰²See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Engel*, 370 U.S. 421; *McGowen v. Maryland*, 366 U.S. 420 (1961); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1942).

The application of the coercion standard "like many problems in constitutional law, is one of degree." *McCullum v. Board of Education*, 333 U.S. 203, 213 (1948). It is well established "that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 333 (1987) (citing *Hobbie v. Unemployment Appeals Commission*, 107 S.Ct. 1046, 1051 (1987)). One time, temporary, annual, or occasional accommodation by the government of religious activity does not violate the First Amendment.¹⁰³ "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow

¹⁰³See e.g., *Schempp*, 374 U.S. at 298 n. 74.

the widest room for discussion, the narrowest range for its restriction, particularly when this right is expressed in conjunction with peaceable assembly."

Thomas v. Collins, 323 U.S. 516, 532 (1945).¹⁰⁴

C. Utilization Of The Coercion Standard Allows Invocations And Benedictions At Public School Graduation Ceremonies.

At least two Federal District courts have implicitly acknowledged the coercion standard for analysis in cases involving the identical question of prayer at graduation ceremonies for public schools.¹⁰⁵

¹⁰⁴ Case concerned labor union dispute and freedom of speech, but demonstrates that coercion standard has been applied by this Court in other First Amendment cases.

¹⁰⁵ There are relatively few studies which have been done on the historical development of commencement exercises. However, one such study indicates that the "commencement program ... consists primarily of an invocation, a commencement, address, the awarding of degrees, the awarding of honorary degrees, and the benediction." Kevin Sheard, *Academic Heraldry in America* (1962). See

One court upheld the practice reasoning

a member of the clergy, who is in no way compensated by the [school board], pronounce an invocation or benediction at graduation ceremonies which are totally separate from the school routine, does not violate ... the First Amendment. Any use of public tax monies in connection with the invocation and benediction appears to be de minimis.... [N]o infringement of any First Amendment rights will occur because of the opening and closing of clergymen at the graduation exercises. Because there is no compulsion to attend, there is no coercion which would constitute an abridgment of the Free Exercise Clause.

Wood v. Mt. Lebanon Township School District, 342 F. Supp. 1293, 1295 (W.D. Pa. 1972) (citing *School District of Abington*

also, Mary Gunn, *A Guide to Academic Protocol* (1969). So too, "one of the earliest 'Order of Exercises' for the University of Virginia is dated June 26, 1850 ... [and] lists the orders of events, ... begin[ning] with prayer." John W. Whitehead, *The Rights of Religious Persons in Public Education*, 210 (1991). Though "[c]ommencement exercises in public high schools were not started until 1842 ...[,] the high schools primarily copied the university format and thus included prayer." *Id.*

Township v. Schempp, 374 U.S. 203 (1963)). Another court upheld prayer at graduation services finding

[t]here is none of the repetitive or pedagogical function of the exercises which characterized the school prayer cases. There is no element of calculated indoctrination. The overall program of which the invocation will be a part is neither educational nor religious, but ceremonial, and the total length of the invocation has been estimated as only a few minutes. Such an occasion with such an invocation has not occurred previously before this audience and it will not occur again. The event, in short, is so fleeting that no significant transfer of government prestige can be anticipated.

Grossberg v. Deusibio, 380 F. Supp. 285, 289 (E.D. Va. 1974).

The application of the coercion standard is consistent with the original intent of the First Amendment. Government acts which, directly or indirectly, compel or coerce, remain prohibited.¹⁰⁶ However,

¹⁰⁶See *supra* note 102.

government acts allowing voluntary release time, *Zorach*, *supra*; supplying textbooks to students in parochial schools, *Board of Education v. Allen*, 392 U.S. 236 (1968); churches tax exempt status, *Walz v. Tax Commissioner*, *supra*; grants to church-sponsored universities and colleges, *Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976); *Tilton v. Richardson*, 403 U.S. 672 (1971); legislative prayer, *Marsh v. Chambers*, 463 U.S. 783 (1983); and religious symbols to be displayed as holiday decorations, *Lynch v. Donnelly*, *supra*; are just a few of the precedents which remain permissible under the coercion standard.

CONCLUSION

The Court of Appeal's decision should be reversed. Invocations and benedictions are ceremonial exercises dictated by tradition, not by government coercion. Our

religious heritage fosters the freedom to accomodate religious beliefs and creeds. Continuing to utilize the *Lemon* test results in suppression of religious accomodation.

Subjective interpretation of the test in the lower courts has caused chaos which cannot be reconciled with original intent. Instead of government accomodating religious heritage, our nation is being compelled to ignore its religious heritage. Once government accomodation of religion is chilled, those who do not believe are favored at the expense of those who do believe.

The coercion standard allows government to acknowledge our religious heritage while remaining true to the original intent of the Establishment Clause. The coercion standard provides a mechanism for restraining government from

intentionally coercing or compelling compromise of religious beliefs and choice.

The coercion standard allows invocations at graduation ceremonies. Adopting a coercion standard for Establishment Clause cases provides a clear and objective standard by which to make decisions.

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In The
Supreme Court of the United States

October Term, 1990

ROBERT E. LEE, Individually and
as PRINCIPAL OF NATHAN BISHOP
MIDDLE SCHOOL, et al.,

Petitioners,

v.

DANIEL WEISMAN, etc.

Respondents.

On Writ Of Certiorari To
The United States Court Of
Appeals For The First Circuit

BRIEF OF THE SOUTHERN BAPTIST
CONVENTION CHRISTIAN LIFE
COMMISSION AS AMICUS
CURIAE SUPPORTING PETITIONERS

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BRIEF OF THE SOUTHERN BAPTIST
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COMMISSION AS AMICUS
CURIAE SUPPORTING PETITIONERS

This brief is being filed with the written consent of
counsel for both the petitioners and the respondents,
which consents have been filed with the clerk of the
Court.

INTEREST OF THE AMICUS CURIAE

The Christian Life Commission is the moral concerns
and public policy agency for the Southern Baptist

Convention, the nation's largest Protestant denomination, with over 15 million members in nearly 38,000 local churches. The Christian Life Commission also has an assignment from the Convention to address matters of religious liberty.

Southern Baptists have a significant interest in the issues presented in this case. This case involves the Religion Clauses of the First Amendment, and Baptists have always been deeply involved in promoting and protecting the principle of religious liberty, including the separation of the institutions of the Church and State. Indeed, this case arises in Rhode Island, which was founded by Baptist Roger Williams in his search for religious liberty.

This case also involves public education, and Southern Baptists have a longstanding commitment to local public schools. Many Southern Baptist parents have served on local school boards. Many have worked as teachers and administrators in public schools. Most Southern Baptist parents have chosen to educate their elementary and secondary school children in their local public schools. Many of our pastors are invited regularly to speak and to pray at public ceremonies, such as the graduation ceremony in this case. Thus, Southern Baptists are vitally interested in the public policies involving religious freedom and public education, and both parents and pastors will be affected by the outcome of this case.

STATEMENT OF THE CASE

The School Committee of Providence, Rhode Island, has for many years chosen to include in the annual

graduation ceremony for its junior high and high schools, an invocation and a benediction by local clergy. School principals perform the administrative task of rotating the invitation to clergymen of various faiths. The schools provide the clergy with guidelines for the ceremonies prepared by the National Conference of Christians and Jews, which stress inclusiveness and sensitivity in authoring prayer for civic ceremonies. In 1989, at a middle school commencement, Rabbi Leslie Gutterman gave the invocation and benediction, which were described later by the district court judge as "examples of elegant simplicity, thoughtful content and sincere citizenship."¹ Pet. Brief for Cert. at Appendix 20a, 21a.

¹ Invocation: God of the Free, Hope of the Brave: For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it. For the liberty of America, we thank You. May these new graduates grow up to guard it. For the political process of America in which all its citizens may participate, for its court system where all can seek justice, we thank You. May those we honor this morning always turn to it in trust. For the destiny of America, we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it. May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled. Amen

Benediction: O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement. Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepared them. The graduates now need strength and guidance for the future. Help them to understand

(Continued on following page)

The district judge held that the Establishment Clause prohibited the graduation prayers, under the three-part test formulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).² In announcing that graduation prayer inherently advances religion, the district judge used some chilling words:

"Since the landmark 1962 decision of *Engel v. Vitale* 370 U.S. 421 (1962), . . . God has been ruled out of public education as an instrument of inspiration or consolation." Pet. App. 21a. " . . . [I]f Rabbi Gutterman had given the exact same invocation . . . with one change - God would be left out - the Establishment Clause would not be implicated. The plaintiff here is contesting only an invocation or benediction which invokes a deity or praise of a God. (Pet. App. 21a.)

"The fact is that an unacceptably high number of citizens who are undergoing difficult times in this country are children and young people. School-sponsored prayer might provide hope to sustain them, and principles to guide them in the difficult choices they confront today. But the Constitution as the Supreme Court views it does not permit it. . . . Those who are

(Continued from previous page)

that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly. We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion. Amen.

² Chief Justice Burger wrote for the majority: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."

anti-prayer thus have been deemed the victors. That is the difficult but obligatory choice this Court makes today." (Pet. App. 29a)

The First Circuit Court of Appeals adopted the opinion of the district judge.

SUMMARY OF ARGUMENT

Traditional invocations and benedictions at public ceremonies do not violate the Establishment Clause, because they are non-coercive accommodations of the religious needs of the community and its student population. Government accommodation of religious speech facilitates the exercise of beliefs and practices independently adopted, rather than inducing or coercing beliefs and practices acceptable to government. Such accommodation does not interfere with the religious liberty of non-adherents by forcing them to participate in the prayers. The accommodation does not favor one form of religious belief over another.

ARGUMENT

ACCOMMODATION OF RELIGIOUS PLURALISM IS A PUBLIC VALUE WHICH SHOULD BE TAUGHT IN PUBLIC EDUCATION.

Has God been ruled out of public education?

The decision of the district court says bluntly that current Establishment Clause doctrine prohibits the word

"God" from utterance in a graduation invocation or benediction, because "God has been ruled out of public education . . ." and "(t)hose who are anti-prayer have thus been deemed the victors." *Id.*, 21a, 29a.

The district judge's opinion virtually cries out for reversal, so that public schools might be spared from the "obligatory choice" made by the court. *Pet. App.* 29a. Compelled to apply the tripartite test to its logical conclusion, the court felt it was forced to hold that every public school function must be absolutely secular – without a prayer, and without one unutterable word – "God."

The Values-Inculcation Mission of Public Schools.

The public schools are supposed to be our nation's training ground for the knowledge and values which will produce good citizenship and character. In *McCullum v. Board of Education*, 333 U.S. 203 (1948) at 231, the Court said: "The public school is at once the symbol of our democracy and the most persuasive means for promoting our common destiny."³ The Court has affirmed the role of public schools as "a principal instrument in awakening the child to cultural values" [*Brown v. Board of Education*, 347 U.S. 483, 493 (1954)]; of "inculcating fundamental

³ John Whitehead, *RIGHTS OF RELIGIOUS PERSONS IN PUBLIC EDUCATION*, 209-210 (1991). See also Justice William Brennan, *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). "The classroom is peculiarly 'the marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues,' (rather) than through any kind of authoritative selection."

values necessary to the maintenance of a democratic political system" [*Ambach v. Norwick*, 441 U.S. 68, 77 (1979)]; and as a tool to transmit "community values." [*Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982)].

As we approach the twenty-first century, the crisis in American public education is recognized to be both academic and moral. Literacy and aptitude scores decline while drug abuse, sexually-transmitted disease, teenage pregnancy, and violence increase. School officials struggle desperately to teach academics and values, while also striving to keep schools relentlessly secular, as the *Lemon* test seems to require. But relentless secularism also violates the Establishment Clause. In a 1981 report concerning lawlessness in American culture, former Chief Justice Warren Burger opined: "Possibly some of our problem of behavior stems from the fact that we have virtually eliminated from public schools and higher education any effort to teach values of integrity, truth, personal accountability and respect for other's rights."⁴

Public Schools – Training Americans to be Tolerant Citizens.

Professor Michael McConnell has observed that "individual choice in religion is a public value; the state itself is religiously pluralistic – not secular."⁵ One of the values which public schools should transmit is respect

⁴ *Annual Report to the A.B.A. by the Chief Justice of the United States*, 67 A.B.A.J. 291 (1981).

⁵ M. McConnell, *Accommodation of Religion*, *Sup. Court Rev.*, 1985, page 41.

and tolerance for the religious choices of others. Pluralism is promoted by exposing children and adults to differing religious beliefs and practices in a community, in a respectful, accommodating way. When school officials show respect and tolerance for the religious diversity of the community, they promote this public value. This enriches the educational experience and builds understanding and respect. Just as racial harmony cannot grow in the soil of racial segregation, neither can religious harmony spring up in a system of "religious apartheid."⁶

The courts below, applying *Lemon*, hold that the public institution whose goal is to teach good citizenship and tolerance cannot itself tolerate prayers at public meetings, for fear that this might have the "primary effect" of advancing or endorsing religion. Many parents and teachers have retreated from public schools, in part because they refuse to accept the "absolutely secular" model. They perceive a "brooding and pervasive devotion to the secular, and a passive, and even active, hostility to the religious."⁷ If the trend of strict separationism continues, many more Americans may seek greater "educational choice" to find a more tolerant alternative, and public school enrollment will continue to decline.

By giving all religious views represented in the community and its student population an equal opportunity to participate in invocations and benedictions, the public

⁶ Whitehead, *supra*, page 33.

⁷ Associate Justice Arthur Goldberg, *Abington School District v. Schempp*, 374 U.S. 203, 306 (1963).

school system encourages freedom of religious choice. Parents and students are less likely to feel compelled to seek alternative education systems in order to find religious liberty, if they find accommodation and respect in public education.

Many parents and students believe that all knowledge has a unifying source in a personal God; that all truth is God's truth; and that the ultimate aim of education is to know God personally. For these Americans, there is no such thing as "secular" knowledge or "value-neutral education." To have mandatory school attendance laws, but to make no accommodation for this viewpoint, amounts to a denial of equal protection of the laws for these parents and their children.

Religious speech is still protected speech.

Another serious public value at risk in this case is freedom of speech. Please note that the district judge's opinion says that the rabbi's speech would have been lawful, but for a certain word, "God." Presumably if the word had been uttered as a curse or in vain, there would have been no Establishment Clause issue. However, since the rabbi was obviously sincere in believing he was addressing a personal God, the words have become a prayer, and inherently "religious," and therefore impermissible. It is as though religious speech at a public function is a sort of "super-obscenity," which is unprotected by the Free Speech Clause.

Time to reverse the trend.

The Supreme Court has already begun to reverse the trend, to uphold choices developed by families, working

through their local school boards, for non-coercive ways to accommodate the religious and moral needs of public school students. *Mergens v. Westside Community Schools*, 110 S.Ct. 2356 (1990), clearly established the principle of equal access to facilities for student-led, student-initiated religious expression during a limited open forum in a public high school. Upholding graduation prayer in this case would be another step in the right direction, to correct the mistaken perception that public schools must always discriminate against religious expression, even by private citizens in after-hours voluntary programs.

ACCOMMODATION WITHOUT COERCION IS THE GOAL OF RELIGION CLAUSES.

There is widespread agreement that the Establishment Clause and the Free Exercise Clause have as their common ultimate goal the protection of religious liberty.⁸ Professor McConnell's article, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986) makes clear that the primary good of the religion clauses is freedom of religious choice, and the primary evil is government coercion which interferes with religious choice. Religious liberty includes both individual choice of religious belief and practice, and autonomy of religious organizations from government interference.

Accommodation of religious liberty by public school officials helps fulfill the values-inculcation mission. As the Court stated in *Zorach v. Clauson*, 343 U.S. 306, 313-14, (1952):

⁸ M. McConnell, *Accommodation*, *supra*, p.1.

"When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."

Establishment Clause protects religious choice from official coercion.

The Establishment Clause protects religious liberty by preserving religious pluralism, free from government interference which might distort religious choice. Prior to 1962, it was generally agreed that a major aim of the Establishment Clause, as stated in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), was to "forestall compulsion by law of the acceptance of any creed or the practice of any form of worship."

In *Engel v. Vitale*, 370 U.S. 421, 430 (1962), the Court struck down a school board rule requiring the New York Board of Regents prayer⁹ to be repeated daily aloud by each class. For the first time, the Court said that freedom from coercion of conscience was not the primary interest being served:

"The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct government compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate to coerce non-observing individuals or not."

⁹ "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."

The *Lemon* Test ignores the element of coercion.

The *Lemon* test does not consider the element of official coercion which would interfere with religious pluralism. It does not provide clear guidance to officials and courts who must draw lines between permissible accommodations of religion and impermissible benefits to religion.

Consistency has not been a hallmark of the *Lemon* test. It has been used to prohibit the display of a poster listing the Ten Commandments in Kentucky classrooms, *Stone v. Graham* 449 U.S. 39 (1980). Yet, in *Lynch v. Donnelly*, 465 U.S. 668 (1984), Chief Justice Rehnquist observed that "The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent – not seasonal – symbol of religion: Moses with the Ten Commandments." 465 U.S. at 677. School children who regularly tour and observe the chambers of our highest court should learn, as educated citizens, that the Ten Commandments provide the foundation for the legal and moral code for Western Civilization, and that they are rooted in Judeo-Christian history. The fact of religious origin and the presence of religious words should not have voided the Kentucky law. In *Lynch*, the Court side-stepped *Lemon* and upheld a nativity scene display by the city of Pawtucket, Rhode Island. But in *County of Allegheny v. A.C.L.U.*, 109 S.Ct. 3086 (1989), the Court upheld a government display including a menorah, while prohibiting a government display of a creche, citing *Lemon* as the basis for both holdings.

***Lemon* Test promotes secularism, not religious pluralism.**

The very formulation of the *Lemon* test seems to obscure the value of religious liberty. The legislative purpose must be secular. The primary effect must be secular, neither advancing nor inhibiting religion. Insisting on a secularizing purpose, and permitting only secular effects makes the test inherently hostile to religious liberty.

The Establishment Clause separates the institutions of Church and State, but it does not separate the influence of religion and morality from government. If the Establishment Clause prohibited government from expressing benevolent regard for religion, then the Free Exercise Clause would have been the first violation of the Establishment clause. The Free Exercise clause is clearly official action affirming the inherent value and good of religious liberty, so that its free exercise is to be among the first freedoms to be protected in our Bill of Rights.

Lemon seeks to create a vacuum in the public square by excluding everything that is religious. But nature abhors a vacuum, and emptying the public square of religious content does not create a neutral zone. Instead, the secularism which fills the public square brings its own non-theistic values which are antithetical to religion, and intolerant of religious pluralism.

Accommodation of Religion includes religious speech.

An Establishment Clause test should be reformulated to allow official accommodations, but not official endorsement, of religious speech. Unlike *Lemon*, this case does not involve direct government financial aid, and the

Court may save for another day the reformulation of the special aspects of the test which pertain to financial benefits. But in any event, the Establishment Clause test should have as its goal the promotion of religious pluralism as a public value, and the protection of individual choice and institutional autonomy from government coercion and interference. A test based on these principles, would include the following:¹⁰

- I. Does the official accommodation facilitate the exercise of religious beliefs and practices, adopted through private, family, church and community influences, independent from State influence, rather than inducing or coercing beliefs and practices acceptable to the government?
- II. Does the accommodation interfere with the religious liberty of others by forcing them to participate in religious observance?
- III. Does the accommodation favor one form of religious belief over another?¹¹

Graduation prayers are non-coercive.

In the present case, the graduation prayers facilitate the exercise of longstanding, traditional practice by

¹⁰ M. McConnell, *Accommodation*, pages 35-39.

¹¹ Another element to consider when financial aid cases are reviewed might be: "IV. Does the accommodation use the government's taxing power, or is expenditure of public funds structured so the effect will be 1) to induce, coerce or distort individual religious choice, or 2) to interfere with the religious autonomy of a religious institution, or 3) to promote religion, or discriminate against a religion, by providing a direct subsidy to religious indoctrination of belief." See *Walz v. Tax Commission*, 397 U.S. 664 (1970).

religious groups in the community. No public official is praying or prescribing the content of any prayer.¹² No public funds are paying for the prayer. The mandatory attendance laws, which compelled the *Engel* students to be a captive audience during the school day, do not require attendance at this voluntary, after-hours, civic program, where family and friends are present. No one is pressured to participate. No reasonable person should feel like an "outsider" or a "second class citizen" if he does not believe or participate in the brief prayers in the program. Any person who does not wish to participate is free to remain silent, think about other things, or even excuse himself from the room for the 30-45 seconds the prayer may last. The prayers are a minuscule portion of an otherwise wholly secular program. Any appearance of endorsement by officials is offset by the non-preferential nature of the forum. The Solicitor General has correctly observed: "In short, whatever special concerns about subtle coercion may be present in the classroom setting - where inculcation is the name of the game - they do not carry over into the commencement setting, which is more properly understood as a civic ceremony than part of the educational mission." Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, page 18. Finally, the school principal did not discriminate against certain religions in his rotation of invitations to various religious leaders in the community.

¹² The district court judge described this as "school-sponsored prayer" which might help students. Pet. App. 29a. While we agree with his assessment of the value of prayer, we disagree that this private prayer is "school-sponsored," but rather it is school-accommodated.

The Sixth Circuit Court of Appeals made similar findings in *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), upholding historic, traditional invocations and benedictions at public school graduation ceremonies. The *Stein* court considered that the tradition of including an invocation and benediction to solemnize this rite of passage predates the founding of the American republic.¹³ The court compared these facts to *Marsh v. Chambers*, 463 U.S. 783 (1983) and *Lynch v. Donnelly*, 465 U.S. 668 (1984), in which the Supreme Court found historical tradition and practice to be relevant to Establishment Clause analysis. Traditional religious expressions or symbols in civic ceremonies, especially those which are similar to practices in the era of the Founding Fathers, should not be held to violate the Establishment Clause apart from a finding of some government coercion.

Free Speech and Equal Protection.

The Religion Clauses should protect freedom of choice, including those who choose unbelief. Persons who disagree with the content of the prayer have a right to their opinion, but they should not have the right to

¹³ J. Whitehead, *supra*, 209-210 (1991). "The first graduation services began in Oxford, England, as early as the twelfth century. In America, the tradition began at Harvard in 1642. The program consisted of a prayer by the president of the institution and addresses by members of the graduating class. Commencement exercises in public high schools were not started until 1842. The high schools primarily copied the university format." See also the discussion that Thomas Jefferson saw no Establishment Clause violation by the traditional practice of commencement prayer at public schools.

force their opinion on others, by asking government to censor all public religious expression which they claim offends them. In the Free Speech arena, even the most hateful speech must be tolerated, even though a listener may claim to be offended.¹⁴ Surely, religious speech cannot be relegated to some lower standard, to some super-obscene standard, so that "religious words" in a prayer must be prohibited if anyone claims "offense". This hardly promotes religious pluralism, tolerance, and the common good.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), Justice White based his dissent in part on a distinction between religious speech, which he said was protected in school buildings, and religious worship, which he said was not protected. (White, J., dissenting at page 283-86) The majority disagreed, noting that this distinction would entangle officials and courts in the scrutiny of words, motives and religious significance by religious groups, to discern what words were mere speech, and what words were religious worship. *Widmar, supra*, at 269-70, note 6; 272 note 11.

Suppose, for example, that the minister had read during the invocation from the presidential proclamation, calling for prayers of thanksgiving for the success of Operation Desert Storm in the Persian Gulf.¹⁵ Would references to the "Heavenly Father" and the "Lord" in the proclamation, and quotations from the Old Testament, be

¹⁴ *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Cohen v. California*, 403 U.S. 15 (1971).

¹⁵ Presidential Proclamation No. 6257, March 7, 1991.

impermissible as "prayer," or as "sectarian" religious words?

It should be noted that, according to the lower court record, the rabbi was invited without any direct instruction from the school to pray, or how to pray. Pet. App. 19a. The private speaker controlled the content of the speech. This is as it should be. The school board certainly should not involve itself, in the name of avoiding establishment problems, in policing the content of the speech or prayer. See *Marsh, supra*, at 794 ("The content of the prayer is not of concern to judges.") It should be left to the manners of the private speaker to be gracious and sensitive to the pluralistic nature of his audience.

Your amicus urges this Court not to adopt that part of the *Stein* holding which protected the prayer only so long as the words were "non-denominational" or "non-sectarian." It does not promote religious pluralism for government to permit speech only about a generic "brand-X" God. If a Baptist preacher is prohibited from praying "in the name of Jesus Christ," or a rabbi prohibited from praying to "Jehovah," the state has gone too far, and now truly infringes on religious conscience. The price for participation in community life would be too high if it requires a legal gag on the religious conscience of the speaker. The value of religious pluralism must neither be sacrificed on the altar of merely civil religion, nor abandoned in the arid, hostile desert of stifling secularism.

CONCLUSION

The State is to be religiously pluralistic – not secular. This Court can advance this value by restoring freedom of religious choice as the touchstone of the Religion Clauses, and by protecting religious expression in civic ceremonies so long as official coercion is absent.

Truly, public schools in America "do not have a prayer," if the one unmentionable word at public school functions is "God." The opinion below poignantly serves up the sour fruit which the *Lemon* tree has borne. This Court is now presented with a compelling occasion, not to just revise and sweeten *Lemon*, but to uproot and replace it with an Establishment Clause doctrine which will promote religious liberty rather than obliterate it.

The judgment of the Court of Appeals should be reversed.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

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Petitioners,

v.

DANIEL WEISMAN,
Respondent.

On Writ of Certiorari to the United States
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BRIEF OF
THE UNITED STATES CATHOLIC CONFERENCE
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF
THE UNITED STATES CATHOLIC CONFERENCE
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic Bishops in the United States. The Conference advocates and promotes the pastoral teaching of the Bishops in such diverse areas as education, family life, health and hospitals, social welfare, immigrant aid, poverty assistance, civic education, youth activities, and communications. When permitted by court rules and practices, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people in the United States, particularly when the Religion Clauses of the Constitution are implicated.

With well over fifty percent of all Catholic school-age children attending public elementary and secondary schools, the Church maintains a vital interest in the quality of their educational experience. Every student in this country's public and private school deserves a full opportunity to develop intellectually, physically and spiritually. By providing such an education, our schools can serve to prepare children to be responsible and mature citizens. However, when any aspect of their development is ignored or suppressed, the children and society both suffer. Judicial decisions like the one on review here are symptomatic of the trivialization of spiritual and religious values in the public schools in the name of "separation of church and state." In the face of judicial restraint on public expression of prayer on a voluntary basis, it is a serious question whether this Nation can hope to instill in its children the values which the Founders thought necessary to the preservation of civic virtue and public morality.

This *amicus* previously filed briefs in other cases before this Court concerning religion in the public schools and the proper interpretation of the Establishment Clause. See, e.g., Briefs *amicus curiae* of the United States Catholic Conference in *Board of Education v. Mergens*, No. 88-1597; *Bender v. Williamsport Area School District*, No. 84-773; and *Widmar v. Vincent*, No. 80-689. Those briefs indicate the serious attention this *amicus* gives to the proper relation of religious values and education, especially when religious expression is involved. This *amicus* believes that the circumstances of this case demand scrupulous protection, not suppression, of religious expression.

Through their counsel, the parties have given consent to the filing of this brief.

SUMMARY OF ARGUMENT

This case presents a unique challenge to the Court—whether to continue to take a narrow view of the issue of public prayer under the Establishment Clause, or whether to put the issue of school prayer in its proper first amendment context. In the view of this *amicus*, the proper focus for this case requires a comprehensive view of all of the various first amendment liberties implicated by religious speech. In *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court found that religious worship and discussion in a public school setting implicated not only Establishment Clause but Free Speech, Assembly and Free Exercise concerns as well. *Widmar* held that the Establishment Clause, when properly construed, could not be used presumptively to suppress other important first amendment interests. The *Widmar* approach, emphasizing freedom of expression, must control in this case.

At each session of this Court, a government employee calls out: "God save the United States and this Honorable Court." In the mind of an atheist, whether the speaker or a listener, the incantation may be empty formalism or, at best, a reminder of an earlier heritage and tradition. In the mind of a believer, the incantation may be a prayer—the deepest expression of a faithful heart. In both cases, the state of mind of the speaker and the listener is beyond the competence of the government to control; it is the quintessence of protected thoughts and beliefs. Similarly, the words expressed, unless within narrow categories of obscene or injurious speech, are entitled to constitutional protection. It follows even more strongly that it is not the government's business to subject the content of a private person's public expressions to a general rule of prior restraint. Yet a content-based restraint on freedom of expression is precisely what the lower courts adopted in this case.

This case is, therefore, one more example of the unjust dichotomy that has developed in lower federal courts'

treatment of cases involving religious speech in our public schools. The courts afford scrupulous constitutional protection to those who speak critically of religion, even within the confines of a public school classroom. Yet they restrain the free expression of anyone who dares speak reverentially to or about God, even at public functions where attendance is voluntary. These contradictory results not only defy common sense, and any definition of justice, they are neither constitutionally required nor permissible. The Establishment Clause alone, when properly construed to effectuate the Framers' intentions, does not require the prior restraint of prayer at government-sponsored functions. The Free Speech Clause, when applied to religious expression as it was in *Widmar*, does not permit it. It is this *amicus*' position that constitutional protection, not just accommodation, is therefore required for the public prayers at issue in this case.

ARGUMENT

I. PRAYER IS A FORM OF EXPRESSION ENTITLED TO FIRST AMENDMENT PROTECTION.

In reviewing this case, this Court may be tempted simply to classify it as "school prayer" and examine only *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington School District v. Schempp*, 374 U.S. 203 (1963). The Court might also be tempted to view this case as implicating only the Establishment Clause and apply *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Neither approach embraces the reality that, from *Brown v. Board of Education*, 347 U.S. 483 (1954), through *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), to *Board of Education v. Mergens*, 110 S. Ct. 2356 (1990), this Court has more fully and comprehensively delineated the scope of constitutional, especially first amendment, rights in public schools. Of particular importance in this line of cases is *Widmar v. Vincent*, 454 U.S. 263 (1981).

In *Widmar*, this Court took an integrated approach to the various clauses of the first amendment—an approach that recognized the interdependence of Free Speech and Free Exercise, Assembly and Establishment, without diminishing the independent vitality of any of the amendment's various Clauses. *Widmar*, 454 U.S. at 267-77. Unlike *Employment Division v. Smith*, 110 S. Ct. 1595 (1990), which seemingly made Free Exercise dependent on other constitutional guarantees,¹ *Widmar* enhanced the complementary nature of the protection afforded by the first amendment. In particular, the *Widmar* Court recognized religious worship as a form of speech and subjected to strict scrutiny any attempt to use the Establishment Clause to justify a ban on religious speech. *Widmar*, 454 U.S. at 269-70.² For the reasons discussed below, a similar approach is appropriate and necessary to the proper consideration of the issues presented by this case.

A. Public Speakers, Even Those Who Pray, May Not Be Silenced Where School Discipline Is Not Disrupted.

Justice Brennan summarized this Court's view of the important work of public schools in this way:

Public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic. See *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S. Ct. 686, 691, 98 L.Ed. 873 (1954). The public school . . . incul-

¹ *Smith*, 110 S. Ct. at 1601-02. For an exposition of the illegitimate bases for creating such dependency, see McConnell, "Free Exercise Revisionism and the *Smith* Decision" 57 *Univ. of Chicago L. Rev.* 1120-27 (1990). Treating this case as if it only embodies one constitutional concern—Establishment—would invite the same kind of narrow jurisprudential error committed in *Smith*.

² Last Term, *Mergens* confirmed the vitality of *Widmar* and exemplified this Court's commitment to comprehensive constitutional analysis. *Mergens*, 110 S. Ct. at 2370-71.

cates in tomorrow's leaders the "fundamental values necessary to the maintenance of a democratic political system" *Ambach v. Norwick*, 441 U.S. 68, 77, 99 S. Ct. 1589, 1595, 60 L.Ed.2d 49 (1979). All the while, the public educator nurtures students' social and moral development by transmitting to them an official dogma of "community values." *Board of Education v. Pico*, 457 U.S. 853, 864, 102 S. Ct. 2799, 2806, 73 L.Ed.2d 435 (1982) (plurality opinion) (citation omitted).

The public educator's task is weighty and delicate indeed. It demands particularized and supremely subjective choices among diverse curricula, moral values, and political stances to teach or inculcate in students, and among various methodologies for doing so.

Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562, 573-74 (1988) (Brennan, J., dissenting). The petitioners in this case, public school officials, were doing precisely that when they invited a member of the community to give an invocation and a benediction during a commencement exercise. Nevertheless, the United States District Court for the District of Rhode Island,³ together with the United States Court of Appeals for the First Circuit,⁴ intervened. What those courts found to be beyond the school administration's "supremely subjective choices" concerning "fundamental values," "community values," and "moral values" was that the speaker, Rabbi Gutterman, appeared voluntarily, at the invitation of the school's principal, Robert E. Lee, and gave the invocation and benediction during a traditional graduation program at which attendance was voluntary.⁵ Rabbi Gutterman, speaking to and about God, gave thanks for America, for

³ *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I. 1990).

⁴ *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990).

⁵ 728 F. Supp. at 69, *aff'd*, 908 F.2d 1090.

the students, and for life.⁶ His short statements occupied a few moments of a lengthy program and apparently caused no disruption or public protest, not even by plaintiffs in this action.⁷

The plaintiffs here obviously took offense, however, in the very fact that the Rabbi was *praying*.⁸ Some persons in attendance that day may not have believed in God or prayer but thought the Rabbi's remarks superfluous. Others in that audience might have been offended by the fact that a rabbi, and not a priest, imam, or minister, was saying the prayers. Some might have disagreed with the prayers' content—the slightly "political" tone of the invocation,⁹ or the paraphrase of an Old Testament prophet in the benediction.¹⁰ There was something in what was said, how it was said, or who said it, that could, and undoubtedly did, prove upsetting to some of those who chose to attend the ceremony. But it is not the business of the courts to control the subjective intentions, mental impressions, or emotional personalities of the citizenry. One of this Court's most famous, and most quoted, lines from the *Tinker* case is:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to

⁶ *Id.* at 69 n.2, 70 n.3.

⁷ *Id.* at 69-70.

⁸ The *Guidelines for Civic Occasions* pamphlet produced by the National Conference of Christians and Jews, and referred to by the lower courts (908 F.2d at 1095 (Bownes, J., concurring); 728 F. Supp. at 69), states that: "General public prayer on civic occasions is *authentic* prayer that also enables people to recognize the pluralism of the American Society." [Emphasis supplied.] Nothing in this brief *amicus curiae* should be taken to suggest otherwise.

⁹ 728 F. Supp. at 69 n.2, *aff'd*, 908 F.2d 1090.

¹⁰ Compare *id.* at 70 n.3, with Micah 6:8.

avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

Tinker, 393 U.S. at 509. Without question, no one intended "discomfort and unpleasantness" to anyone at that graduation ceremony, but if plaintiffs or others were annoyed, their uneasiness could be said to be integrally related to the very nature of freedom of expression. *Tinker*, 393 U.S. at 513.

The mere recitation of the prayers certainly caused none of the disruption to discipline that can justify banning speech in a public school setting.¹¹ By contrast, the lower courts' orders forbidding the invocation and benediction seem to have been much more threatening to the school's peace and order.¹² Even if Rabbi Gutterman, or any other past or future invitee, chose to pray in a manner strictly following the doctrines and traditions of a particular faith, and even if such prayer were delivered in Hebrew, in Arabic, or in Latin, the government would have no business regulating content, style, or manner, so long as discipline, order and civility did not suffer. *Hazelwood*, 108 S. Ct. at 567; *id.* at 573 (Brennan, J., dissenting). Indeed, it could be well argued

¹¹ This Court has stressed that protected speech may not be restrained absent a showing that it will substantially disrupt order:

Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . ; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Tinker, 393 U.S. at 508-09 (citation omitted). See also *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951).

¹² See 908 F.2d at 1090 n.1 (Bownes, J., concurring) (describing what apparently occurred at a subsequent graduation ceremony).

that such prayers by different speakers at various school functions are an appropriate pedagogical approach to instilling in the students a recognition of our country's cultural and religious diversity. See generally *id.* at 578-80 (Brennan, J., dissenting).

The first amendment of the U.S. Constitution enshrines freedom of speech and freedom of religion as "fundamental values necessary to the maintenance of a democratic political system" *Ambach*, 441 U.S. at 77. Without a doubt, one of the purposes of public education is the inculcation of those same fundamental values the amendment protects. *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). Even though this Court has also said that "[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions,"¹³ it cannot be that prayer, like obscenity¹⁴ or fighting words,¹⁵ is one of those "modes of expression" "subject to sanctions." *Widmar*, 454 U.S. at 269 n.6; *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953).

One contemporary commentator has stated that, "it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers." L. Tribe, *American Constitutional Law* 834 (1978). Likewise, a construction of the first amendment which subordinates the Free Speech Clause to the Establishment Clause ignores the generative history of the amendment. More than that, given their joint placement in the Bill of Rights, it is a logical absurdity and an abuse of basic constitutional principle. The decisions below result in just such an illogical rule of intolerance, namely, that religious expression, however voluntary, orderly, and otherwise appropriate, has no place in a

¹³ *Fraser*, 478 U.S. at 683.

¹⁴ *Miller v. California*, 413 U.S. 15 (1973).

¹⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

public school. This is an especially dangerous precedent because it withdraws religious values from the educational process at a time when values are formed and conscience is molded.

[T]o be silent about religion may be, in effect, to make the public school an antireligious factor in the community. Silence creates the impression in the minds of the young that religion is unimportant and has nothing to contribute to the solution of the perennial and ultimate problems of human life.

American Council on Education, *The Function of the Public School in Dealing With Religion*, 6 (1953). See S. Rep. No. 357, 98th Cong., 2d Sess. 14-21 (1984).

B. This Court Must Not Tolerate Decisional Law That Allows Religious Values To Be Denigrated While Public Reverence Is Prohibited.

When this Court upheld the authority of public school officials to discipline a student for giving a lewd, indecent speech to six hundred fellow students, it stressed that the "fundamental values of 'habits and manners of civility' essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular." *Fraser*, 478 U.S. at 681. According to lower federal courts, however, such "tolerance of divergent . . . religious views" is mandatory, it seems, only so long as those views denigrate religion, God or Jesus Christ.¹⁶ Such tolerance can not be tolerated, however, as soon as someone tries to speak in a reverential way to or about God.¹⁷ The sad fact is that the "habits and manners of civility" this Court spoke of just five years ago in *Fraser* are difficult to discover in the cases that have come to

¹⁶ See, e.g., *Pratt v. Independent School District*, 670 F.2d 771, 776-77 (8th Cir. 1982); *Sheck v. Baileyville School Committee*, 530 F. Supp. 679, 681 n.2 (D. Me. 1982).

¹⁷ *Weisman v. Lee*, 728 F. Supp. at 74-75, *aff'd*, 908 F.2d 1090.

exemplify freedom of expression in the public schools to date.

For example, the decisions below hold that bringing religion even briefly into a public school graduation ceremony is constitutionally forbidden;¹⁸ but in Minnesota, the public school board cannot remove from the classroom a movie that contains graphic violence, denigrates religion, criticizes family values and portrays God as vengeful and bloodthirsty. *Pratt v. Independent School District*, 670 F.2d 771 (8th Cir. 1982). Within the First Circuit, the Constitution forbids the word "God" to be uttered at an official school ceremony,¹⁹ and requires that a public high school teacher be permitted, during a basic English class, to write on the blackboard and discuss openly a profanity for sexual intercourse. *Mailloux v. Kiley*, 323 F. Supp. 1387 (D. Mass. 1971), *aff'd*, 448 F.2d 1242 (1st Cir. 1971). In Rhode Island, the federal courts have said that the first amendment does not allow a school principal to invite a member of the clergy to recite a peaceful prayer at a voluntary school function;²⁰ yet one of those same courts has ruled that a male homosexual's freedom of expression would be violated unless he is allowed to invite his male escort to the school's senior prom, even when public disruption is possible. *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980). Similarly, although the courts in this case have enjoined the free expression of thanks to God,²¹ in another case the first amendment has been held to prevent administrators from removing a school library book in which the words "Jesus," "Christ" and "God" are used as profanity along with common obscenities. *Sheck v. Baileyville School Committee*, 530 F. Supp. 679 (D. Me. 1982).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 68-70.

²¹ *Id.* at 69 n.2.

Prayers that the district court in this case characterized as voluntary, ecumenical and sensitive to the beliefs and opinions of the community are strictly forbidden;²² yet poems that are vulgar, profane and offensive to community sensibilities must be made available in a public school library. *Right to Read Defense Committee v. School Committee*, 454 F. Supp. 703 (D. Mass. 1978). One federal court will enjoin a school from allowing a clergyman to give a public prayer;²³ while another federal court in the same circuit enjoins a school from suspending a student for publicly giving a teacher "the finger." *Klein v. Smith*, 635 F. Supp. 1440 (D. Me. 1986). A local school principal may not allow a rabbi to ask God's blessing on teachers and God's help for students;²⁴ while another school principal cannot stop a student newspaper from publishing a fictitious letter ridiculing the student chaplain. *Reineke v. Cobb County School District*, 484 F. Supp. 1252 (N.D. Ga. 1980). A rabbi can be prevented from publicly praising America's court system in an invocation;²⁵ yet the Senior Circuit Judge writing a concurring opinion in this case, acting in his capacity as a federal official sworn to uphold the Constitution, can quote the words of Jesus from the Gospel of Matthew, chapter 6, verses 5-7, to chastise that same rabbi for praying in public. *Weisman v. Lee*, 908 F.2d at 1090-91 n.1 (Bownes, J., concurring).

Reading the above litany of cases, one must ask how the same first amendment can require school administrators to permit teachers in public school classrooms, where students are required to be present, to engage in practices critical of religion;²⁶ while it prohibits admin-

²² *Id.* at 73.

²³ *Id.* at 75.

²⁴ *Id.* at 70 n.3.

²⁵ *Id.* at 69 n.2.

²⁶ *Pratt*, 670 F.2d at 776-77.

istrators outside the classroom, in situations where students and their parents are voluntarily present, from any deference to the religious values of the community.²⁷ What lessons are our children learning about democracy, the Constitution and civic virtue when they can be forced to read and discuss obscenities,²⁸ but they are shielded from even hearing someone pray?²⁹ Without regard to whether any of the Free Speech cases mentioned above were decided rightly or wrongly, the point is that this Court must intervene to resolve the dichotomy that has developed in its first amendment jurisprudence. This Court has already held that prayer, as a form of religious expression, is speech for purposes of first amendment protection. *Widmar*, 454 U.S. at 269. The courts are simply not authorized to discriminate against religious speech or to distinguish between differing modes of religious speech. *Fowler*, 345 U.S. at 70.

If *Tinker* still teaches that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"³⁰ then surely school principals and their invited guests retain their constitutional rights as well. If Principal Lee invited, as a graduation speaker, a person of public notoriety who advocated controversial views on subjects such as the Vietnam war, the Palestine Liberation Organization, homosexuality or defacing the flag, the same courts that banned Rabbi Gutterman from future benedictions might well follow their other decisions protecting speech as

²⁷ *Weisman v. Lee*, 728 F. Supp. at 74-75, *aff'd*, 908 F.2d 1090.

²⁸ *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *see also Mailloux*, 323 F. Supp. at 1389.

²⁹ *Weisman v. Lee*, 728 F. Supp. at 74-75 & n.10, *aff'd*, 908 F.2d 1090.

³⁰ *Hazelwood*, 108 S. Ct. at 567 (quoting *Tinker*, 393 U.S. at 506). *See also Mergens*, 110 S. Ct. at 2379 (Marshall, J., concurring in judgment) ("That the Constitution requires toleration of speech over its suppression is no less true in our Nation's schools.").

freedom of expression.³¹ In doing so, those courts could seek solace in this Court's opinion that "[i]n our system, state-operated schools may not be enclaves of totalitarianism." *Tinker*, 393 U.S. at 511. Yet history has shown that under totalitarian regimes, religion is the first to suffer. And as recent world events demonstrate, with freedom and democracy comes the return of the churches. J. Wood, "Rising Expectations for Religious Rights in Eastern Europe" 33 *J. of Church & State* 1 (1991).³²

"We are a religious people," this Court declared in 1952. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).³³ And the fact is, we still are.³⁴ Only forty years after

³¹ *Gay Students Organization of Univ. of New Hampshire v. Bonner*, 509 F.2d 652, 660-62 (1st Cir. 1974); *Cline v. Rockingham County Superior Court*, 502 F.2d 789, 791 (1st Cir. 1974); *Riseman v. School Committee*, 439 F.2d 148, 149 (1st Cir. 1971); see generally *Redgrave v. Boston Symphony Orchestra*, 855 F.2d 888, 902-04 (1st Cir. 1988), cert. denied, 488 U.S. 1043 (1989).

³² See also Luers, "Czechoslovakia: Road to Revolution" *Foreign Affairs* (Spring 1990) 77; Donnelly, "Albania: And Then There Were None" *Time* (May 21, 1990) 37; Hruby, "Keeping the Faith" *National Review* (Jan. 22, 1990) 27.

³³ Twelve years later, Justice Douglas, joined by Justice Black, opined that a challenge to a public school baccalaureate service did not raise a substantial federal question. *Chamberlin v. Dade County, Board of Public Instruction*, 377 U.S. 402, 402-403 (1964) (Douglas, J., concurring in part).

³⁴ Americans are overwhelmingly religious. Gallup & Castelli, *The People's Religion* 4 (1989). Over the past half of the century the "religious character of the nation" has remained "stable." *Id.* Our religious beliefs and practices have changed little, and the importance of those beliefs is undeniable:

It is easy to illustrate the importance of religion to Americans:

—94 percent believe in God.

—90 percent pray.

—88 percent of Americans believe that God loves them, and only 3 percent believe this is not the case.

[Continued]

Zorach, however, the lesson our children are learning from the federal courts is not only the opposite, it is false. Surely in a nation where "fundamental values" are expected to be upheld in our public schools, the religious values of the people must be included. To do otherwise neither "respects the religious nature of our people" nor "accommodates the public service to their spiritual needs." *Zorach*, 343 U.S. at 314.³⁵ In *Fraser*, this Court correctly emphasized that:

[T]hese "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.

Fraser, 478 U.S. at 681. It is hard to imagine any prayers more "considerat[e] of the sensibilities of others" or more clearly within "the boundaries of socially appropriate behavior" than the invocation and benediction delivered by Rabbi Gutterman at the Nathan Bishop Middle School in Providence, Rhode Island. They deserved constitutional protection, not approbation.

³⁴ [Continued]

—More than three-quarters say their religious involvement has been a positive experience over their lifetimes, with 38 percent saying it has been 'very positive.'

—78 percent say they have given 'a lot' or 'a fair amount' of thought to their relationship with God over the past two years.

Id. at 45 (emphasis added).

³⁵ See also American Council on Education, *supra* at 6.

II. THE ESTABLISHMENT CLAUSE, RIGHTLY INTERPRETED, DOES NOT PROHIBIT WHAT THE FREE SPEECH CLAUSE ALLOWS—PUBLIC EXPRESSION OF RELIGIOUS BELIEF.

The parties presented this case, and the lower courts analyzed and decided this case, as implicating only the Establishment Clause of the first amendment.³⁶ In so doing, they failed to discern that both Free Speech and Religion Clause concerns are implicated.³⁷ *Widmar*, 454 U.S. at 270. It is nevertheless plain from the opinions below that both lower courts in this case considered the State's interest in enforcing the Establishment Clause so compelling that they were willing to engage in the prior restraint of one form of expression³⁸—prayer—at all future graduation ceremonies without regard to where the ceremonies are held, who the other invited speakers are or what they might say, what other types of programs are sponsored by the school system, who initiates the inclusion of prayers in the ceremonies, what other groups are allowed access to the same public facilities and for what purposes, and a host of other factors that are relevant to the scope and appropriateness of the permanent injunction entered below. *Widmar*, 454 U.S.

³⁶ *Weisman v. Lee*, 728 F. Supp. at 70, *aff'd*, 908 F.2d 1090.

³⁷ Because of their approach to this case, the opinions below lack sufficient facts to determine, *inter alia*, what type of public forum is at issue in this case. *Widmar*, 454 U.S. at 267 n.5. Clearly, however, the graduation ceremonies in question are “forums” more “open” than the junior and senior high school classrooms and libraries involved in the cases discussed in part I.B. of this brief *amicus curiae*. *Hazelwood*, 108 S. Ct. at 567-68. Therefore, since the speech protected in those cases has been allowed, the religious speech in this case demands similar treatment. In any case, there is simply no justification for the lower courts’ content-based censorship of religious speech. *Widmar*, 454 U.S. at 276.

³⁸ Such prior restraint is “obnoxious to the Constitution” even when authorized “by judicial decision after trial” as in this case. *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940).

at 267-75; see also *Perry Education Association v. Perry Local Educators’ Association*, 460 U.S. 37, 45-49 (1983).

No matter what their approach to this case, however, both the district court and the First Circuit fell into the fundamental error of misinterpreting the purpose and effect of the Establishment Clause. Properly construed, the Establishment Clause is not “sufficiently ‘compelling’ to justify content-based discrimination against . . . religious speech.” *Widmar*, 454 U.S. at 276. By applying this Court’s Establishment Clause cases in such a way that “[t]hose who are anti-prayer have been deemed the victors,”³⁹ the district court turned the first amendment on its head and transformed the Religion Clauses into the enemy of religion instead of its protector.

A. The Establishment Clause Was Never Intended To Bar Public Expression Of Religious Belief.

The Framers of the Constitution “had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people . . .; they did not intend to spread over all the public authorities and the whole public action of the nation, the dead and revolting spectacle of an atheistical apathy.” S. Rep. No. 376, 32d Cong., 2d Sess. 4 (1853); see also *Zorach*, 343 U.S. at 312. Any doubt on this point was surely dispelled by the early congressional actions accommodating and even directly benefiting religion in general. *Marsh v. Chambers*, 463 U.S. 783, 786-90 (1983); *Wallace v. Jaffree*, 472 U.S. 38, 99-110 (1985) (Rehnquist, J., dissenting). The Clauses were included in the Bill of Rights “not as a protection from religion, but rather as a protection for religion. They were inserted in our Constitution largely because its framers felt that they were important to insure the continuance and the strengthening of religion, which could not flourish under American conditions if any State Church were either provided for or tolerated.” I A. Stokes,

³⁹ *Weisman v. Lee*, 728 F. Supp. at 75, *aff'd*, 908 F.2d 1090.

Church and State in the United States 556 (1950) (emphasis in original).

In his dissenting opinion in *Jaffree*, Chief Justice Rehnquist quoted extensively from Justice Story, who emphasized that the Framers plainly believed religion and morality to be intimately connected with the well-being of the state and essential to the administration of civil justice.⁴⁰ In addition, Justice Story expressed the view that "universal approbation" would have met any attempt by the government to "level all religions" and hold all in similar indifference.⁴¹ In his Farewell Address, President Washington indicated that "religion and morality are indispensable supports" for political prosperity. Washington's Farewell Address, reprinted in 131 Cong. Rec. S. 1372 (Daily Ed. Feb. 18, 1985). "Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience forbids us to expect national morality can prevail in exclusion of religious principles." *Id.* Likewise, Thomas Jefferson often avowed that religious training was a necessary prerequisite for the formation of the democratic citizen. A. Howard, et al., *Church, States, and Politics*, 78-80 (1981). As Rector of the University of Virginia, Jefferson requested and received approval for various religions to establish schools of theology on the public university campus. See *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 245-47 & nn. 11-13 (1948) (Reed, J., dissenting) (quoting extensively from Jefferson's writings on this point).⁴²

The first amendment reflects the experience of its Framers that officially established religion generates re-

⁴⁰ *Jaffree*, 472 U.S. at 104-05 (Rehnquist, J., dissenting).

⁴¹ *Id.*

⁴² Further examples of Thomas Jefferson's support for religion in public life appear in Chopko, "Intentional Values and the Public Interest—A Plea for Consistency in Church/State Relations" 39 *DePaul L. Rev.* 1143, 1164-65 (1990).

ligious intolerance and infringes upon personal liberty.⁴³ The Establishment Clause was not designed to drive a wedge between church and state, but rather to avoid those relationships between the two which pose a realistic threat of impairing religious liberty. See *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984). When the Establishment Clause is applied to reach results which cannot be justified in terms of religious liberty, it fails in fidelity to the intended constitutional purpose. This is certainly the case when it is used to invalidate governmental accommodation of activities, such as voluntary public prayer, which serve the public interest and which pose not the remotest threat to religious freedom. Such suppression of delicate fundamental rights to freedom of speech and religion could well "teach youth to discount important principles of our government as mere platitudes." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943).

The lower courts' view in this case is, therefore, fundamentally inconsistent with the historical tradition and political reality that resulted in the first amendment. The Framers of the Constitution would be surprised, no doubt, to hear a federal court proclaiming that "God has been ruled out of public education as an instrument of inspiration or consolation."⁴⁴ Indeed, the Framers themselves turned to prayer for just such purposes. For example, on June 28, 1787, at the Constitutional Convention in Philadelphia, Doctor Benjamin Franklin addressed this motion to the President of the Convention, General George Washington:⁴⁵

⁴³ See, e.g., *Schempp*, 374 U.S. at 221-22; *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961).

⁴⁴ *Weisman v. Lee*, 728 F. Supp. at 70, *aff'd*, 908 F.2d 1090.

⁴⁵ *Notes of the Debates in the Federal Convention of 1787 Reported by James Madison* (A. Koch, ed. 1987) 209-10. According to Madison, Benjamin Franklin's stature at the Convention was second only to Washington's. *Id.* at 23.

Mr. President

The small progress we have made after four or five weeks close attendance & continual reasonings with each other—our different sentiments on almost every question, several of the last producing as many noes and ayes, is methinks a melancholy proof of the imperfection of the Human Understanding.

* * * *

In this situation of the Assembly, groping as it were in the dark to find political truth, and scarce able to distinguish it when presented to us, how has it happened, Sir, that we have not hitherto once thought of humbly applying to the Father of lights to illuminate our understandings? In the beginning of the Contest with G. Britain, when we were sensible of danger we had daily prayer in this room for divine protection.—Our prayers, Sir, were heard, & they were graciously answered.

* * * *

I therefore beg leave to move—that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that Service.

One Convention delegate who heard Doctor Franklin's speech that day, later expressed his conviction that God had guided their proceedings. That delegate, James Madison, wrote in *Federalist* No. 37:

It is impossible for the man of pious reflection not to perceive in [the work of the Constitutional Convention] a finger of that Almighty Hand which has been so frequently and singularly extended to our relief in the critical stages of the revolution.

Hamilton, Madison, Jay, *The Federalist Papers* (C. Rossiter, ed., 1961) 230-31. It is also impossible, upon reflection, to believe that those who wrote the Constitution intended for the Establishment Clause to override the Free Speech Clause in general or that, more spe-

cifically, voluntary public prayer at government-sponsored ceremonies was to be prohibited.

B. Even Viewing The Establishment Clause In Isolation, The Expression Of Prayer Is Not Unconstitutional.

The lower courts in this case seem to be of the view that the generative process that led to the Establishment Clause becoming part of the Bill of Rights is of no relevance to determining issues presented by this case. In their view, the Constitution is entirely secular because it does not contain the word God; therefore, their simplistic reasoning goes, there can be no mention of God in a government-sponsored function consistent with constitutional history. *Weisman v. Lee*, 908 F.2d at 1091 (Bownes, J., concurring). Next, they find significance in the fact that the Supreme Court itself has differed on the interpretation of that history. *Id.* at 1092-93. And finally, because there were no public schools at the time of the formation of the Constitution, the courts below seem unable to discern an adequate rule of decision despite the relevance of the history and tradition of the Establishment Clause to the ultimate interpretation of the facts in these circumstances.⁴⁶ The basic conclusion of the courts below is that history and tradition add nothing to the debate and, therefore, need not even be considered. *Id.* Thus the courts here have avoided their responsibility to do what this Court expected of judges—interpret the Establishment Clause such that it “comport[s] with what history reveals was the contemporaneous understanding of its guarantees.” *Lynch*, 465 U.S. at 673.

⁴⁶ Indeed, Judge Bownes, in his concurring opinion construing the words “respecting an Establishment,” cites Justice Stevens’ unique notion that “respecting” includes showing respect for. This turn of a phrase might explain the divergence in the case law noted in argument I.B. above, but it is irreconcilable with the benevolent neutrality that this Court requires of government in its treatment of religious exercise. *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970).

The issue presented in this case is whether an invocation or benediction may be appropriately expressed at a government-sponsored program where children and adults of differing religious dispositions are present. For the plaintiffs to prevail in their proposed application of the Establishment Clause to this issue, this Court would have to find, contrary to its conclusion in *Roemer v. Board of Public Works*, 426 U.S. 736, 745-46 (1976), that there must exist a hermetic separation between religion and government. Such has never been the purpose of the Establishment Clause. As detailed by the Chief Justice in *Jaffree*, 472 U.S. at 91-99 (Rehnquist, J., dissenting), the generative process that resulted in the Establishment Clause shows that it had two purposes: first, to prevent Congress from establishing or favoring a *national* religion; second, to prevent Congress from interfering with the *states'* policies with regard to religion.⁴⁷ There is nothing in the records of the First Congress to indicate that the use of the word "respecting" was in any way intended to alter the meaning of an established religion as being a *national* religion.⁴⁸ Likewise there is nothing in the records that indicates a narrow and hostile view of religion.

The first version of the Religion Clause was among a number of amendments to the Constitution proposed by

⁴⁷ 1 *Annals of Congress* 730-31 (Gales & Seaton eds. 1789); Corwin, "The Supreme Court As National School Board" 14 *Law and Contemp. Probs.* 3, 11 (1949); I A. Stokes, *Church and State in the United States* 539-40 (1950); M. Malbin, *Religion and Politics—The Intentions of the Authors of the First Amendment* 16 (1978).

⁴⁸ At the time of the Constitutional Convention, there was a wide diversity of views and practices among the states regarding established religion. See III *Debates on the Adoption of the Federal Constitution* 330 (J. Elliot 2d ed. 1836). When the Establishment Clause was made applicable to the states through the 14th Amendment, it did no more than extend the proper definition of *established* to the states as well. *Cantwell*, 310 U.S. at 303.

James Madison on June 8, 1789. *Jaffree*, 472 U.S. at 94 (Rehnquist, J., dissenting). It provided:

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

1 *Annals of Congress* 434 (Gales & Seaton eds. 1789). He advised that many doubted amendments to the Constitution were necessary to secure individual liberty. *Id.* at 432. He also stated the amendments would "not injure the Constitution" and were "likely to meet the concurrence [of the states] required by the Constitution." *Id.* at 432-33. The amendments were referred to a Select Committee. *Id.* at 665. Because of the diversity of views on religious liberty among the states, the Select Committee consisted of one representative from each state. *Id.*

The Select Committee reported language similar to that proposed by Madison regarding establishing religion except that the word "national" had been deleted.⁴⁹ Deletion of that word reflected a concern that the new government might be viewed as "national" rather than "federal," with authority over state practices beyond its enumerated powers.⁵⁰ On August 15, the House considered the amendment reported by the Select Committee. Madison explained its meaning to be "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals* at 730; *Jaffree*, 472 U.S. at 95-96 (Rehnquist, J., dissenting). He also

⁴⁹ National Archives and Records Service, *The Story of the Bill of Rights* 6 (1980).

⁵⁰ More than one commentator has noted the importance of the national versus federal issue to the development of the Establishment Clause. See J. Story, *Commentaries on the Constitution of the United States* 731 (1833); Corwin, *supra* note 47, at 10; Malbin, *supra* note 47, at 17.

observed that the amendment had been required by some state conventions which feared the Constitution might have given the Congress authority to make laws that infringe the rights of conscience or establish a national religion; "to prevent these effects he presumed the amendment was intended" *Jaffree*, 472 U.S. at 95-96 (Rehnquist, J., dissenting) (quoting 1 *Annals* at 730).

If anything, the language of the Select Committee's proposal ("No religion shall be established by law . . .") evoked limited concern that it might be construed *adversely* to religion. 1 *Annals* at 729-30.⁵¹ Madison sought word changes to satisfy those who objected that the proposal might actually be harmful to religion. Ultimately the language passed by the House was indistinguishable from the Select Committee's version explained by Madison. The amendment was intended as a warning sign to government, not a roadblock to the influence of religion. As the Chief Justice has emphasized:

None of the other Members of Congress who spoke during the August 15th debate expressed the slightest indication that they thought the language before them from the Select Committee, or the evil to be aimed at, would require that the Government be absolutely neutral as between religion and irreligion.

Jaffree, 472 U.S. at 99 (Rehnquist, J., dissenting).

The importance of the Establishment Clause's generative history was effectively blunted by its omission from consideration in the *Everson* case—the very threshold of Establishment Clause analysis.⁵² *Everson's* sweeping as-

⁵¹ Peter Sylvester of New York suggested the wording of the amendment "might be thought to have a tendency to abolish religion altogether." 1 *Annals* at 729. At least two commentators have concluded that Sylvester thought the language might be interpreted as forbidding all governmental assistance to religion. See W. Berns, *The First Amendment and the Future of American Democracy* 8 (1976); M. Malbin, *supra* note 47, at 7.

⁵² *Everson v. Board of Education*, 330 U.S. 1 (1947).

sertions against aid to religion, restated a year later in *McCullum*, 333 U.S. at 210-11, severely restricted the interpretative value of the history of the Religion Clauses. *Everson* suggested that the Religion Clauses were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia Bill for Religious Liberty enacted in 1785 ("Virginia Bill"). However, the operative language of the Virginia Bill reveals the difficulty with this view:

That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief

Everson, 330 U.S. at 13. This Bill differed greatly (a) from that which Virginia recommended two years later as an amendment to the Constitution, (b) from that which Madison proposed, and (c) from that which was finally included in the Establishment Clause. By perpetuating the errors introduced in *Everson*, the lower courts in this case arrived at conclusions that cannot be justified in light of the true history and purpose of the Establishment Clause.⁵³

Because of the weight given to Virginia's church-state tradition by the *Everson* court, and relied upon by the courts below,⁵⁴ it is particularly important to review that State's reaction to the proposed Constitutional amendment. What we now call the Bill of Rights took effect when Virginia finally ratified the first ten amendments to the United States Constitution on December 15, 1791. Two years earlier, when the Virginia legislators had initially considered the amendments proposed by the First

⁵³ *Weisman v. Lee*, 728 F. Supp. at 70 n.6; *Weisman v. Lee*, 908 F.2d at 1093 (Bownes, J., concurring).

⁵⁴ *Id.*

Congress, they postponed ratification and stated their objection to the Religion Clauses:

The . . . amendment, recommended by Congress, does not prohibit the rights of conscience from being violated or infringed; and although it goes to restrain Congress from passing laws establishing any national religion, they might notwithstanding, levy taxes to any amount, for the support of religion of its preachers; and any particular denomination of Christians might be so favored and supported by the General Government, as to give it a decided advantage over others, and in the process of time, render it as powerful and dangerous as if it was established as the national religion of the country.

This amendment then, when considered as it related to any of the rights it is pretended to secure, will be found totally inadequate, and betrays an unreasonable, unjustifiable, but a studied departure from the Amendment proposed by Virginia and other states, for the protection of these rights.

Journal of the Senate of the Commonwealth of Virginia, 1785-1790, 62-63 (1982). However, no change to the wording of the first amendment occurred between the time of this statement and Virginia's ultimate ratification. Virginia apparently demanded no change, further explanation or even reassurance. Taking the expressed concerns at face value, Virginia voted affirmatively on the Establishment Clause, understanding that its particular view on the relation of religion to government was not adopted.

The fact is that the great variety of people who ratified the first amendment in the states did not share a church-state tradition in common with Virginia or each other.⁵⁵

⁵⁵ The panorama of opinion on church-state relations found expression in the laws of the states. The variety of state statutes were succinctly catalogued by Sanford H. Cobb in S. Cobb, *The Rise of Religious Liberty in America* 507 (1902). I A. Stokes, *supra* note 47, at 444.

Rather, the experience of Virginia differed from that of most early Americans. The Religion Clauses were molded to meet the needs and wishes not only of the people of Virginia, whose proposal was not adopted, but of the varied and sometimes widely divergent views of all the states on the appropriate relation of government to religion. Virginia cannot reasonably be presumed to have been the desired prototype of people who, with deliberation, selected very different models of church-state accommodation for their own states. The first amendment, ratified by representatives and conventions of eleven states, was the combined product of differing states' preferences. The failure of *Everson* to recognize this reality has led to misguided lower court decisions such as those in this case.

C. Proper Interpretation Of The First Amendment Requires Considering The Clauses Together In Their Historical Context.

Plainly no single *amicus* brief can adequately review Colonial and constitutional history as it has been expounded in books, treatises and articles over the years. Several of those historical works are cited in Chief Justice Rehnquist's dissenting opinion in *Jaffree*, 472 U.S. at 91-103 (Rehnquist, J., dissenting). However, the above brief survey highlights the reality of the issues confounded by the lower courts in this case. In particular, it points to the concerns raised by the Framers during the first amendment's drafting process that the Establishment Clause might be wrongly construed as a limitation on religion, rather than its protector, even though James Madison himself, the principal sponsor of the Clause, clearly disagreed with that construction. Unfortunately, such a prediction seems to have come remarkably close to being true in the hands of the lower courts in this case. One struggles in vain to find in the opinions below some indication that our constitutional traditions received due deference. This Court should, therefore, as it did in

Widmar, pronounce a construction of the Establishment Clause which preserves all the first amendment rights implicated here, while upholding the values sought to be protected by the Framers.

This Court has explained before that it will construe the Constitution reasonably, taking words "in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816). Ultimately, "every clause in every constitution . . . must have a reasonable interpretation, and be held to express the intention of its framers." *Woodson v. Murdock*, 89 U.S. (22 Wall) 351, 369 (1874). The reasonable interpretation of the first amendment, including the Establishment Clause, consistent with the expressed intention of the Framers, does not require the invalidation of the public school practice at issue in this case. Rather, the history and tradition of the Establishment Clause, which this Court scrupulously tries to apply,⁵⁶ indicates that the lower courts were wrong in taking such a narrow and cramped view of the Constitution. A comprehensive and sensitive reading of the first amendment requires a contrary result—a result that protects free expression of religion. *Widmar*, 454 U.S. at 269. This case presents a timely vehicle for this Court to reassert that message.

⁵⁶ *Lynch*, 465 U.S. at 678.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the First Circuit should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT E. LEE, *et al.*,
Petitioners,
v.

DANIEL WEISMAN, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

**BRIEF OF CONCERNED WOMEN FOR AMERICA
AND FREE SPEECH ADVOCATES
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

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3291

QUESTION PRESENTED

Do public secondary school students possess the requisite intellectual competence and independent judgment necessary to discern the difference between *government* speech endorsing religion, which is prohibited by the Establishment Clause, and *private* speech, which is protected by the Free Speech Clause, such as that of a rabbi's invocation during commencement exercises?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1448

ROBERT E. LEE, *et al.*,
Petitioners,
v.
DANIEL WEISMAN, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF OF CONCERNED WOMEN FOR AMERICA
AND FREE SPEECH ADVOCATES
AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI *

Concerned Women for America

Concerned Women for America ("CWA") is a national, nonprofit organization representing approximately 700,000 people. The purpose of CWA is to preserve, protect and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities.

CWA files this brief in support of the Petitioner because, in the view of CWA, the current state of law re-

* The parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of Court pursuant to Rule 37.3.

specting the Establishment and Free Exercise Clauses of the federal constitution requires significant clarification. Most importantly, the consistent and devoted use of the *Lemon* test by federal trial and appeals courts must be addressed, and corrected, by the Court.

CWA supports the position that private persons may recite a nondenominational invocation during the course of public secondary school graduations and promotional exercises. CWA urges the Court to reverse the decisions of the lower courts herein.

Free Speech Advocates

Free Speech Advocates ("FSA") is a national legal defense project headquartered in New Hope, Kentucky. FSA attorneys specialize in the defense of the constitutional rights to freedom of speech, freedom of conscience, and religious liberty. The primary purpose of FSA is to defend public expressions of personal beliefs and ideals.

FSA firmly believes in the importance of recognizing constitutional protection for religious speech. To construe the Establishment Clause to require official censorship of religious ideas, or even the mere mention of God, is to pervert the first amendment into an instrument for suppressing religious thought and discussion. FSA attorneys, together with CWA attorneys, have participated in preparing and presenting a Petition for a Writ of Certiorari which raises similar issues of Establishment Clause jurisprudence. See *Roberts v. Madigan*, No. 90-1448 (Mar. 15, 1990), *cert. pending*, 59 U.S.L.W. 3654.

SUMMARY OF ARGUMENT

Never has this Court enshrined the analysis from any one of its Establishment Clause decisions as the only test useful in resolving Establishment Clause claims. The Court has not employed the test it applied in *Lemon v. Kurtzman*, 403 U.S. 602 (1989), either as the sole measure of Establishment or in a rigid or formalistic fashion.

Unfortunately, despite this Court's approach, lower federal courts have made the *Lemon* test the sole means for winnowing out governmental Establishments. One real and unfortunate result of rigid, mechanical applications of the *Lemon* test is the absurd results which often are obtained thereby. Such absurdity is not required by the text of the Establishment Clause nor was it intended by its Framers.

If the *Lemon* test has proven unworkable, the Court should forthrightly recognize this development. Other tests for Establishment exist, which tests this Court has employed previously, and which tests provide a more workable frame for analyzing Establishment Clause claims. Significant among the reductions of these other tests is the "coercion" and "direct benefits" test suggested by the dissent in *Allegheny County v. ACLU*, 492 U.S. —, 109 S.Ct. 3086, 3134 (1989). Precedents establish that the hallmarks of a prohibited Establishment include the use of government coercion or the distribution of direct benefits to religious groups or institutions.

In the case at bar, Respondents have complained of the practice of including invocations in graduation and promotional exercises for public secondary schools. There is, however, no coercion evident in the practice complained of. Certainly no direct benefit flows to a religion or religious institution by the practice of permitting an invocation or benediction. The correctness of this view is underscored in the present case, by Respondents' admission, at trial, that attendance at such programs is voluntary, not compulsory. Further, mere exposure to a religious practice by a private individual is not coercive. And, as the Court has recently noted, secondary school students are sufficiently mature to understand the difference between government speech and private speech.

ARGUMENT

I. THE RIGID AND FORMALISTIC APPLICATION OF THIS COURT'S *LEMON* TEST IN THE LOWER COURTS HAS LED TO ABSURD RESULTS NOT REQUIRED BY THE TEXT NOR CONTEMPLATED BY THE FRAMERS OF THE FIRST AMENDMENT.

This Court has “uniformly rejected” “an absolutist approach in applying the Establishment Clause” as “simplistic.” *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984). Indeed,

[r]ather than mechanically invalidating all government conduct or statutes that confer benefits or give special recognition to religion in general or to one faith—as an absolutist approach would dictate—the Court has scrutinized challenged legislation or official conduct to determine whether, *in reality*, it establishes a religion or religious faith, or tends to do so.

Id. (emphasis added).

Since *Everson v. Board of Education*, 330 U.S. 1 (1947), this Court has grappled with various issues related to government activity within the sphere of the religious. In recent years, most decisions pertaining to alleged violations of the Establishment Clause have devolved on this Court’s application of the three-part *Lemon* test set forth in *Lemon*, 403 U.S. 602. The Court, however, has not slavishly applied the *Lemon* test; rather, in one case, the Court resolved an Establishment Clause claim without any substantive discussion of the *Lemon* test or any apparent application of the test in the decision. *Marsh v. Chambers*, 463 U.S. 783 (1983); see also *Larson v. Valente*, 456 U.S. 228 (1982) (*Lemon* not useful in analyzing instances of patent discrimination against a church). Five justices of the Supreme Court have expressed their discomfort with one aspect or another of the *Lemon* test. See *Wallace v. Jaffree*, 472 U.S. 38, 67, 68-69 (1985) (O’Connor, J., concurring in

the judgment); *id.*, at 90, 90-91 (White, J., dissenting); *id.*, at 91, 110-13 (Rehnquist, J., dissenting); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. —, 109 S.Ct. at 3134 (Kennedy, J., together with Rehnquist, C.J., White, J., and Scalia, J., concurring in judgment in part and dissenting in part); *Lynch*, 465 U.S. at 688-89 (1984) (O’Connor, J., concurring). And the Court has “repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area.” *Lynch*, 465 U.S. at 679.

Despite the protestations noted above, courts bound to respect and comply with this Court’s precedents have adopted and applied enthusiastically the *Lemon* test as the sole and controlling criterion for Establishment Clause jurisprudence. For example, in *Sands v. Morongo Unified School District*, No. S012721, slip op. at 9-10 (Cal. May 6, 1991), the plurality enshrined “the *Lemon* test [l]as [the] controlling law for twenty years.” But cf. *id.* at 34 (Lucas, C.J., concurring) (expressing view that, absent compulsory application of the *Lemon* test, the challenged practice would not be found to violate the Establishment Clause); *id.* at 1, 8 (Arabian, J., concurring) (current construction of Establishment Clause compels prohibition of invocations at public high school graduations; “while I concur in the judgment, I do so reluctantly, with the hope and expectation that the high court will soon endorse another view”).

The results in a number of the cases reflect a cloudy confusion that plagues courts which reflexively apply the *Lemon* test in every sort of Establishment Clause case. While some of these decisions approach the level of the amusing, they all bear the scent of that “relentless extirpation of all contact between government and religion,” which does not accurately or adequately reflect “the history or the purpose of the Establishment Clause.” 492 U.S. at —, 109 S.Ct. at 3135 (Kennedy, J., dissenting).

In *Roberts v. Madigan*, 702 F. Supp. 1505 (D. Colo. 1989), *aff'd*, 921 F.2d 1047 (10th Cir. 1990), *cert. pending*, 59 U.S.L.W. 3654 (No. 90-1448 Mar. 15, 1991), the principal of a suburban Denver elementary school undertook a complete purge of materials with a biblical content or nexus from her school. The principal: 1) censored Christian books from the school libraries; 2) removed a Bible from the school library reference shelf; 3) ordered a 5th grade teacher to remove two books, with biblical content, from a classroom library of over 240 books; 4) ordered that same teacher to stop reading from a Bible during a silent reading period during which students also read silently from books brought from home, the school library or chosen from the classroom library.

The classroom library, from which the biblical books were removed, contained books on ancient Greek religion and American Indian religions. The principal did not object to the minority religion materials. The teacher had silently read in front of the students books on Buddhism and Native American religions. The principal did not require the teacher to discontinue teaching about Buddhism or Native American religions.

Applying *Lemon*, the district court ordered the school district to return the Bible to the school library. In the court's view, the values embodied in *Lemon's* analysis mandated removal of the two books from the classroom library and the prohibition on the teacher's occasional silent Bible reading. The Tenth Circuit affirmed the result and the *Lemon* analysis, by a 2-1 vote. 921 F.2d 1047.

In *Wiley v. Franklin*, 497 F. Supp. 390 (E.D.Tenn. 1980), local residents challenged Bible courses being taught in two Tennessee public school districts. In resolving the claims against the challenged practices, the district court applied the *Lemon* test, reviewing in detail each of the Bible lessons. The district court considered *Lemon* to require this examination to determine whether

the lessons objectively presented literature or history, or improperly promoted sectarian doctrine.

Of course, this Court has held that schools may teach about the Bible without inculcating religion. Indeed, "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion or the like." *Stone v. Graham*, 449 U.S. 39, 42 (1980). Rightly, this Court has declared, "the Bible is worthy of study for its literary and historic qualities. Nothing . . . indicates that such study of the Bible or religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment." *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963).

In *Wiley*, the court approved Bible stories about Joshua conquering Jericho (including the Negro Spiritual "Joshua Fit (sic) the Battle of Jericho"), King Saul and David, and a parable told by Jesus of the talents. 497 F. Supp. at 394. Too sectarian, however, were the Bible stories concerning Daniel in Babylon, Moses' instructions from God about the building of the Tabernacle, and the destruction of Sodom and Gomorrah. 497 F. Supp. at 395-96. The judge based his decision on the *Lemon* test. 497 F. Supp. at 394. If *Lemon* requires federal judges to take on the mantle of Sunday School Superintendents, reviewing and approving the lesson plans used in teaching about the Bible or religion, then the entanglement prong of the test is most certainly a self-fulfilling prophecy of prohibited Establishment.

In *Stark v. St. Cloud State University*, 802 F.2d 1046 (8th Cir. 1986), the eighth circuit, in a mechanical application of the *Lemon* test, declared unconstitutional a student teacher plan used by a Minnesota state university. St. Cloud State required education majors to "student teach" for one quarter in an elementary or secondary school. Under the plan, college students were permitted, at their option, to fulfill their student teaching

obligation at participating public, private and parochial schools. The state university paid \$96 per quarter to a school which accepted a student teacher. Out of all of the education majors at St. Cloud State, only three students opted to teach at parochial schools. None of the students were required to participate in the religious life of the schools they chose. One student teacher taught social studies, one taught English and the third taught kindergarten. *Id.* at 1048. The eighth circuit, by a 2-1 vote, said the arrangement violated the primary effect prong of the *Lemon* test. 802 F.2d at 1048-52.

As Judge Easterbrook noted recently, "*Lemon* has lost its tang[.]" *Harris v. City of Zion*, 927 F.2d 1401, 1419, 1424 (7th Cir. 1991) (Easterbrook, J., dissenting). Whether through inherent defect, mechanistic overuse, or a wringing approach that evinces the desire to obtain caustically antireligious results, the mere use of the *Lemon* test now signals an intent to overturn challenged government practices and policies. *See, e.g., Sands*, slip op. at 5-6 (Panelli, J., dissenting) ("Unfortunately, it appears that cases such as this are decided not by applying a test but by choosing which test to apply"). This case presents the Court with the prospect not merely of adjusting the error of the lower courts in the instant case. This case affords the Court an opportunity to check and clarify the general confusion of the judiciary which attends the litigation of Establishment Clause claims.

II. THIS COURT'S ESTABLISHMENT CLAUSE DECISIONS PROVIDE ANOTHER, MORE WORKABLE FRAMEWORK FOR ANALYZING ESTABLISHMENT CLAUSE CLAIMS. THE COURT SHOULD EMPLOY THE COERCION TEST AND DIRECT BENEFITS TEST SUGGESTED BY THE DISSENT IN ALLEGHENY COUNTY.

In *Allegheny County*, 492 U.S. at —, 109 S.Ct. at 3136, Justice Kennedy suggested another Establishment Clause test, gleaned from Supreme Court precedents, to replace the *Lemon* test. Under Justice Kennedy's sug-

gested formulation, a challenged governmental practice does not violate the Establishment Clause if it conforms with the following criteria:

[A G]overnment may not coerce anyone to support or participate in any religion or its exercise; and, it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact establishes a state religion or religious faith, or tends to do so.¹

109 S.Ct. at 3136 (citation and internal quotation marks omitted).

A. The Court's Precedents Establish That The Principal Means Of Identifying Violations Of The Establishment Clause Are Either The Use Of Government Coercion Or The Distribution Of Direct Benefits.

The coercion prong of Justice Kennedy's formulation bars use of governmental compulsion or force to cause people to adopt religious beliefs or participate in religious rituals. The coercion prong is not a creature of Justice Kennedy's making; it is derived squarely from this Court's precedent, as Justice Kennedy noted in his dissent. 492 U.S. at —, 109 S.Ct. 3136-38. Indeed, as this Court firmly stated:

[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943). It is long since beyond dispute that the Establishment Clause:

forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Free-

¹ See also *Westside Community Schools v. Mergens*, 495 U.S. —, 110 S.Ct. 2356, 2376 (1990) (Kennedy, J., and Scalia, J., concurring in part and concurring in the judgment).

dom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law.

Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

Of course, coercion of religious conduct or belief may provide an example of a direct benefit to religion, as Justice Kennedy noted:

Barring all attempts to aid religion through government coercion goes far toward attainment [of the Religion Clauses]. . . . James Madison, who proposed the First Amendment in Congress, apprehended the meaning of the [Religion Clauses] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.

492 U.S. at —, 109 S.Ct. at 3136-37 (citations and internal quotation marks omitted).

The principal reason that a coercion standard more adequately reflects the aims and requirements of the Establishment Clause than does the *Lemon* test is that, “[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal.” *Allegheny*, *id.* at —, 109 S.Ct. at 3137. And “[t]he freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and Free Exercise Clauses.” *Id.* at —, 109 S.Ct. at 3136.

Justice Kennedy’s “direct benefits” standard reflects this Court’s evolving views regarding financial aid to religious individuals and groups. *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986); *Bowen v. Kendrick*, 487 U.S. 589 (1988). In its essence, the “direct benefits” prong finds no violation of the Establishment Clause when government aid inures to the benefit of religious

groups in either of two circumstances: 1) the government benefit flows to individuals or secular recipients, who make a free choice to pass the benefit through to a religious institution; or, 2) the funding comes from a governmental program with a secular governmental purpose, and the religious groups which enjoy the benefit are not the sole recipients of governmental money.

In *Mueller*, the Court upheld a state income tax deduction for tuition and certain other school-related expenses even though the deductible amounts may have been paid by the taxpayer to a religious school. Minnesota granted a deduction for expenses incurred by parents from sending their children to any school, public, private or parochial. *Id.* The tax deduction was not limited to those parents whose children attended private or parochial schools. 463 U.S. at 398. That any benefit at all “flow[ed] to parochial schools,” the Court noted, resulted from “the private choices of individual parents” making education decisions. *Mueller*, 463 U.S. at 400. Certainly, in such cases, there is no direct benefit flowing to religious schools from the government:

Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no imprimatur of state approval can be deemed to have been conferred on any particular religion, or on religion generally.

463 U.S. at 399 (citation and internal quotation marks omitted).

The *Mueller* Court noted the important principle of equal access in affirming the tax plan:

Most importantly, the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools, and those whose children attend nonsectarian private schools or sectarian private schools. Just as in *Widmar v. Vincent*, 454 U.S. 263 (1981), where we concluded

that the State's provision of a forum neutrally available to a broad class of non-religious as well as religious speakers does not confer any imprimatur of state approval, *ibid*, so here: [t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect. *Ibid*.

463 U.S. at 397 (internal quotation marks omitted).

In *Witters*, this Court agreed that government money may be paid to individuals or secular recipients who then choose to donate it to a religious group. This Court said:

It is well-settled that the Establishment Clause is not violated every time money previously in the possession of the State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary.

474 U.S. at 486-87.

The *Witters* Court applied this principle to facts beyond the government payroll scenario. Larry Witters qualified for a state program funding the college education of blind people. Witters was not a government employee; he was a benefit recipient. The Court found that the Establishment Clause did not bar the state from extending benefits to Witters under an existing program for the blind. The lower courts incorrectly had held that Witters' contemplated use of the money he received to obtain a Bible college education violated the second prong of the *Lemon* test. 474 U.S. at 482.

The holdings in *Mueller* and *Witters* seemed to suggest that when governments set up programs with secular governmental purposes, and neutrally disburse funds allocated for such programs to a variety of groups, such programs pass muster under the Establishment Clause, even though religious groups are among the recipients of

program funds. This Court recently confirmed the *Mueller-Witters* suggestion in *Kendrick*, 487 U.S. 589. The *Kendrick* Court said:

We note in addition that this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.

487 U.S. at 609.

Witters presaged this principle. There the Court found that the challenged program had a secular purpose: aiding blind people in their educational pursuits. 474 U.S. at 485. Further, religious colleges were a small fraction of the indirect recipients of the program. 474 U.S. at 488.

Thus the "direct benefits" prong of Justice Kennedy's proposed test reflects the significant developments made by this Court in its Establishment Clause analysis of financial aid to religious institutions in *Mueller*, *Witters*, and *Kendrick*.

B. There Is Neither Coercion Nor Any Direct Benefit To Religion In The Practice Of Permitting An Invocation Or Benediction During A High School Graduation Ceremony Or A Junior High School Promotional Exercise, Particularly When Attendance At Such Exercises Is Admittedly Voluntary.

As an initial consideration, graduation exercises of the sort at issue here are not important state benefits granted to students or parents. In *Smith v. Board of Education*, 844 F.2d 90, 94 (2nd Cir. 1988), the second circuit noted that, as here, "attending the graduation exercise is not a prerequisite to a student receiving his diploma[.]" Consequently the court did

not agree with the district court that attending the graduation ceremony by itself is such an important benefit that deprivation of that benefit is an unconstitutional infringement on [a student's] beliefs.

The [graduation] exercises are merely a social occasion at which students and their families gather to mark an event.

Id. at 94. Thus the court considered that graduation "exercises are not an important benefit conferred by the state and, as a result, [found] that [a student's] interest in attending them is not protected by the [F]ree [E]xercise [C]lause." *Id.*²

In Rhode Island, "every child who has completed . . . six (6) years of life . . . and has not completed sixteen (16) years of life shall regularly attend some public day school during all the days and hours that the public schools are in session. . . ." R.I. GEN. LAWS § 16-19-1. Rhode Island's compulsory school attendance law is in stark contrast to the free and voluntary decision of Respondents to attend graduation and promotional ceremonies. Respondents concede that their participation in, or presence at, public school graduations or promotional ceremonies is voluntary. See Agreed Statement of Facts ¶ 41 (reproduced in the Appendix To Brief in Opposition to Petition for Writ of Certiorari at A9).

The second question raised by the Petition for a Writ of Certiorari is: "Whether direct or indirect government coercion is a necessary element of an Establishment Clause violation?" Pet. at i. Including proof of direct or indirect government coercion, as an element of the test to determine Establishment Clause violations, will not drag the judiciary further into the morass that has attended the use of the *Lemon* test since its adoption. In the present dispute, the parties agreed at trial and the fact remains indisputable that Respondents chose, in the free exercise of their right to choose, to attend the promotional ceremony at Bishop Middle School. Appendix

² Cf. *Swany v. San Ramon Valley Unified School District*, 720 F. Supp. 764 (N.D.Cal. 1989) (no property interest in attending high school graduation exercise such as might compel school district to provide some aspect of procedural due process).

To Brief in Opposition to Petition for Writ of Certiorari at A9 (attendance at graduations and promotional ceremonies is voluntary).

Nor does mere exposure to an invocation, on these facts, result in coercion indicative of an establishment of religion. This Court has suggested as much in its recognition that merely exposing students to the Bible or religion does not violate the Establishment Clause. See, e.g., *Schempp*, 374 U.S. at 225 ("Nothing . . . indicates that such study of the Bible or religion, when presented objectively as part of a secular program of education may not be effected consistently with the First Amendment"); but see *Roberts*, *supra* (requiring expurgation of two biblically oriented children's books from a classroom library of over 240 books and banning teacher's Bible from sight of students in classroom).

C. As The Court Has Previously Noted, Secondary School Students Are Sufficiently Mature To Understand The Difference Between Government Speech And Private Speech.

In *Mergens*, this Court postulated "that secondary school students are mature enough and are likely to understand" the "crucial difference between *government* speech endorsing religion . . . and *private* speech endorsing religion. . . ." 495 U.S. at —, 110 S. Ct. at 2372. In both the Court's view, *Mergens*, *supra*, and as determined by Congress, Equal Access Act (Title 20 U.S.C. §§ 4071 *et seq.*), students in the age groups at issue in commencement prayer cases (ages 17 and older) and in promotional exercises (ages 11 and older) are mentally equipped to discern that not all speech which occurs in school settings is endorsed by school authorities.

As noted in *Mergens*, psychological research strongly suggests that, with respect to basic cognitive maturity, adolescents (including secondary school students) are more like college students and adults than like younger children. Research on intellectual development comprises

thousands of published studies involving hundreds of thousands of individuals ranging in age from birth through adulthood. Such individuals have been assessed in a wide variety of ways with respect to their understanding of various abstract concepts and their ability to engage in a variety of forms of deductive, inductive, and moral reasoning.³ Beginning around age 10 to 12, on the other hand, mature reasoning is often found and differences from adult reasoning can usually be eliminated with brief instruction or feedback.⁴ Children aged 9 or 10 commonly fail to grasp concepts that are spontaneously understood or easily learned by college students. The younger children show systematic and persistent errors in reasoning that are rare or easily correctable in adults.

Adolescent reasoning is far from perfect, of course, but so is that of adults.⁵ To the extent that adolescents deviate from standards of rationality, their deviations are of the same sort commonly found in adults. Differ-

³ See M.D.S. BRAINE & B. RUMAINE, *Logical Reasoning*, 3 HANDBOOK OF CHILD PSYCHOLOGY 263 (P. Mussen ed. 1983); D. MOSHMAN, CHILDREN, EDUCATION, AND THE FIRST AMENDMENT 62-91 (1989); D. MOSHMAN, *The Development of Metalogical Understanding, REASONING NECESSITY, AND LOGIC* (W. Overton, ed. in press); D. MOSHMAN & L.E. LUKIN, *The Creative Construction of Rationality*, HANDBOOK OF CREATIVITY 183 (J. Glover, R. Ronning, C. Reynolds, eds. 1989); D.P. O'BRIEN, *The Development of Conditional Reasoning*, 20 ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR 61 (H. Reese, ed. 1987).

⁴ See, e.g., D. MOSHMAN, *Development of Formal Hypothesis-Testing Ability*, 15 DEVELOPMENTAL PSYCHOLOGY 104 (1979); D. MOSHMAN & B.A. FRANKS, *Development of the Concept of Inferential Validity*, 57 CHILD DEVELOPMENT 153 (1986); W. OVERTON, S. WARD, S. NOVECK, J. BLACK & D. O'BRIEN, *Form and Content in the Development of Deductive Reasoning*, 23 DEVELOPMENTAL PSYCHOLOGY 22 (1987).

⁵ J. EVANS, *THE PSYCHOLOGY OF DEDUCTIVE REASONING* (1982); J. EVANS, *THINKING AND REASONING: PSYCHOLOGICAL APPROACHES* (1983).

ences between the average adolescent and the average adult are relatively small compared to the variability within each group. The sort of clear, qualitative differences from adult reasoning that might justify a sharp legal distinction are simply not found beyond the age of about 10 or 11.⁶

Theories of cognitive development are generally consistent with this picture. The evidence that a level of cognition comparable to that of adults is typically reached about age 11 or 12 is consistent with the classic research of Jean Piaget, the child psychologist whose theory postulate that the stage of formal operations, the culmination of cognitive development, is achieved at this age.⁷ Although some aspects of Piaget's theory have been questioned, the idea that the transition to a level of abstraction typical of adult reasoning occurs no later than age 11 or 12 has been maintained in the major current theories.⁸

1. Analysis of the intellectual demands required to understand that a prayer at a graduation exercise is not "government endorsed" provides no basis for reconsidering the general conclusion of adolescent intellectual competence.

The key empirical issue in the present case is the ability of secondary school students to understand the distinction between (1) a school allowing an invocation at

⁶ D. MOSHMAN, CHILDREN, EDUCATION AND THE FIRST AMENDMENT 78; D. MOSHMAN, *Equal Access for Religion in the Public Schools? An Empirical Approach to a Legal Dilemma*, 9 DEVELOPMENTAL REVIEW (in press).

⁷ B. INHELDER & J. PIAGET, *THE GROWTH OF LOGICAL THINKING* (1958); see also J. BYRNES, *Formal Operations*, 8 DEVELOPMENTAL REVIEW 66 (1988).

⁸ R. CAMPBELL & M. BICKHARD, *KNOWING LEVELS AND DEVELOPMENTAL STAGES* (1986); R. CASE, *INTELLECTUAL DEVELOPMENT* (1985); K. FISCHER, *A Theory of Cognitive Development*, 87 PSYCHOLOGICAL REVIEW 477 (1980).

an annual graduation ceremony, and (2) the school *endorsing* the invocation it allows. The specific legal concept implicated here is the First Amendment principle that government must permit freedoms of belief, expression, and association,⁹ and may not restrict such activity on the basis of the content of those beliefs, the content of what is expressed, or the types of people with whom one wishes to associate.¹⁰

There appears to be no research examining specifically the development of adolescent understanding of First Amendment principles.¹¹ There have been, however, many studies on the development of understanding of similarly abstract concepts. Most relevant is research on the ability consciously and systematically to distinguish form from content. In a representative recent study, students in fourth grade, seventh grade and college were asked to sort and rank a variety of logical arguments.¹² The arguments varied in both form and content. The key issue was the students' ability to understand the concept of validity (whether a conclusion followed from its premises). Most college students spontaneously understood the concept of validity. *Many seventh graders (age 12-*

⁹ U.S. CONST. amend. I. "While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly and petition." *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460 (1958).

¹⁰ See *Healy v. James*, 408 U.S. 169, 180 (1972); *Cantwell*, 310 U.S. 296.

¹¹ One recent survey did examine student perceptions of their high school's existing policies with respect to nonreligious student groups and asked the students to speculate about school attitude toward hypothetical student religious groups. The authors classified 66% of the students as having "perceived absolute neutrality" with respect to religion and only 2% as having "perceived no neutrality". L.F. Rossow & N.D. Rossow, *High School Prayer Clubs: Can Students Perceive Religious Neutrality?*, 45 EDUCATION LAW REPORTER 475 (1988).

¹² D. MOSHMAN & B. FRANKS, *supra* at note 4.

13) showed spontaneous understanding as well.¹³ Fourth graders (ages 9-10), on the other hand, never showed spontaneous understanding of validity and rarely profited from additional guidance provided in follow-up studies.

In sum, a case can be made that children up to about age 10 are qualitatively different from adults in that they are incapable of fully comprehending a variety of abstract concepts. Adolescents, on the other hand, are likely, spontaneously, to use adult concepts. Even if the adult concept is novel to the adolescent, he can usually grasp and apply the concept after a brief explanation.¹⁴ Available evidence does not support a sharp legal distinction between secondary school students and college students.

2. *There is little support for the view that adolescent intellectual competence is seriously undermined by extreme emotionality or susceptibility to social influence.*

Popular myths hold that adolescence is a period of extraordinary emotional turbulence and instability, that adolescents unthinkingly accede to peer pressure on all matters. Psychological research largely has undermined these myths. Adolescents do face difficult developmental challenges, but so do children and adults. Adolescents often do rebel against perceived unreasonable constraints, but so do children and adults. There is general agreement among psychologists that adolescence does not routinely involve a unique level of stress and turmoil.

Similarly, there is little support for the view that adolescents are at the mercy of their peers or incapable of

¹³ With brief instruction regarding the concept of validity provided in follow-up studies, seventh grade performance was statistically indistinguishable from that of college students. *Id.*

¹⁴ *Id.*

autonomous decision-making.¹⁵ It is true that, compared to younger children, adolescents are less dependent on adults and more oriented toward their peers. But adults value and attend to their peers as well. Susceptibility to social influence is a general characteristic of human beings, not a unique trait of adolescents. There is little basis for the view that high school students are sharply distinct from college students or adults in their susceptibility to peer pressure or are impressionable to a degree that undermines earlier religious inculcation by parents or that threatens autonomous decisionmaking in the area of religious beliefs and values.¹⁶

3. *Secondary school students can exercise independent judgment.*

The ability of high school students to exercise independent judgment has been frequently noted by the courts. In *Mergens*, 495 U.S. —, 110 S.Ct. 2356, this Court recognized

that secondary school students are mature enough and likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. The proposition that schools do not endorse everything they fail to censor is not complicated.

(Citations omitted). It is worth noting that Westside High School included grades 9-12.

High school students are capable of hearing various forms of expression without attaching a school endorse-

¹⁵ C. IRWIN, *ADOLESCENT SOCIAL BEHAVIOR AND HEALTH* (1987); J. SANBROCK, *ADOLESCENCE* (3rd ed. 1987); L. STEINBERG, *ADOLESCENCE* (1985).

¹⁶ J.P. HILL & G.N. HOLMBECK, *Attachment and Autonomy during Adolescence*, 3 *ANNALS OF CHILD DEVELOPMENT* 145 (G. Whitehurst ed. 1986); C. LEWIS, *Minors' Competence to Consent to Abortion*, 42 *AM. PSYCHOLOGIST* 84 (1987); A. WATERMAN, *IDENTITY IN ADOLESCENCE* (1985).

ment of the form of expression.¹⁷ See generally, *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 511 (1969) (students are not "closed circuit recipients of only that which the State chooses to communicate"). This Court has held that students are capable of understanding that the study of the Bible as history or literature in public school courses does not lead to an inference of state endorsement of religious teachings. *Schempp*, 374 U.S. at 225. In *Zorach v. Clauson*, 343 U.S. 306, 311 (1952), this Court held that released time programs for religious instruction during the school day did not carry the imprimatur of state approval of religion.

Since students are capable of understanding that allowing forms of political or religious protest does not connote state involvement or approval, *Tinker*, that placement of explicit and controversial materials in a school library does not indicate state approval or agreement with those materials, *Board of Education v. Pico*, 457 U.S. 853 (1982), and that the state's permission for students to leave school grounds for religious instruction does not indicate state support of that particular religion, *Zorach*, then high school students should be credited with the ability to understand that by allowing a "religiously-oriented" invocation at a yearly graduation, the state does not endorse that religious message.

¹⁷ *Seyfried v. Walton*, 668 F.2d 214, 219-20 (3rd Cir. 1981) (Rosenn, J., concurring); see also *Russo v. Central School District No. 1*, 469 F.2d 623, 633 (2nd Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) (teacher's refusal to lead flag salute would not have a destructive effect on students); *James v. Board of Education*, 461 F.2d 566 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972); *Bayer v. Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd mem.*, 515 F.2d 504 (2nd Cir. 1975) (striking down restriction on information about contraception and abortion published in school newspapers); *Wilson v. Chancellor*, 418 F. Supp. 1358 (D.Ore. 1976) (school ban on political speakers during high school classes struck down). See also S.REP.NO. 357, 98TH CONG., 2D SESS. 35 (1984).

Students of high school are are currently bestowed with many rights of an adult nature. This Court has repeatedly recognized that high school students are confronted with many adult situations and are entitled to exercise their independent judgment concerning those situations. In certain circumstances, a mature minor may currently decide to have an abortion without parental notification. See *Ohio v. Akron Reproductive Health Center*, 497 U.S. —, 111 L.Ed.2d 405 (1990). Statutory prohibitions against the sale of contraceptives to minors have been held unconstitutional, thus allowing high school students to make decisions concerning birth control. *Carey v. Population Services International*, 431 U.S. 678 (1977).

If students of high school age are capable of, and entitled to, making such healthcare decisions, certainly they are capable of distinguishing state neutrality from state support of an invocation at a graduation exercise. It would be a constitutional perversity to suggest that minors may demonstrate sufficient judgmental maturity to subvert parental or state interests arising in the abortion context, for example, but then to say with the same breath that a minor lacks the judgmental maturity to discern differences between *government* speech and *private* speech of the sort complained of by Respondents.

Consistently the courts have held that secondary school students are remarkably insightful and are able to hear varied sources of information without perceiving those views as having their school's endorsement. The courts have noted with regularity the "surprisingly sophisticated, intelligent, and discerning" nature of high school students. *Wilson*, 418 F. Supp. at 1368.¹⁸

¹⁸ In upholding a guest speaker's right to address the issue of communism, the *Wilson* court noted that high school students were not susceptible to adopting the speaker's views as those of the school. See also *Seyfried*, 668 F.2d at 219 (Rosenn, J., concurring) ("the Court can take judicial notice of the progressively higher levels of

CONCLUSION

For all the foregoing reasons, the Court should reverse the decisions of the lower courts in this case, adopting the "coercion" and "direct benefits" analysis employed by Justice Kennedy in his dissenting opinion in *Allegheny County*.

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intellectual and emotional development of students in the later grades of secondary school"); *Koppell v. Levine*, 347 F. Supp. 456, 464 (E.D.N.Y. 1972) (recent "legislation, judicial decisions and evolving social attitudes" have altered traditional views of students' rights). See also *Mergens v. Board of Education of Westside Community Schools*, 867 F.2d 1076, 1080 (8th Cir. 1989). The argument that less mature high school students are likely to confuse equal access policy with state sponsorship of religion was explicitly rejected by the Senatorial Committee on the Judiciary in its report of the Equal Access Act:

Authors writing in the leading legal periodicals have considered the issue and agree that students below the college age can understand that an equal access policy is one of State neutrality toward religion, not one of State favoritism.

S.REP.No. 357, 98TH CONG., 2D SESS. 8 (1984).

MAY 24 1991

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT E. LEE, Individually and as Principal of
Nathan Bishop Middle School, *et al.*,
Petitioners,

v.

DANIEL WEISMAN, *etc.*,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit**

**BRIEF FOR FOCUS ON THE FAMILY AND
FAMILY RESEARCH COUNCIL AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1014

ROBERT E. LEE, Individually and as Principal of
Nathan Bishop Middle School, *et al.*,
Petitioners,

v.

DANIEL WEISMAN, *etc.*,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF FOR FOCUS ON THE FAMILY AND
FAMILY RESEARCH COUNCIL AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE* *

Amicus Curiae Focus on the Family is a non-profit organization committed to strengthening the psychological and spiritual health of families in the United States and throughout the world. Focus on the Family's daily radio

* This brief is submitted with the written consent of both parties, filed with the Clerk of this Court.

broadcasts dealing with family issues reach more than one million listeners each day. Its monthly magazine has a circulation of 1.7 million.

Amicus Curiae Family Research Council, a division of Focus on the Family, acts as a voice for the pro-family movement in Washington, D.C., and provides policy analysis and research support for Focus on the Family. Both *amici* deal extensively with the interplay between schools, the family, and religious beliefs and traditions. *Amici's* publications and broadcasts seek to foster involvement of families with their children's schools, both public and private.

Among *amici's* supporters, listeners, and subscribers are thousands of families that send their children to public schools. *Amici* are at the forefront of the effort by these families to strengthen the public schools as institutions that educate and train children to be responsible, productive adults, and good citizens of this country. Such families expect the public schools to serve their proper role without undermining or counteracting the religious values of the family.

Amici and the families involved with and served by *amici* thus have a strong interest in how the federal judiciary polices the intersection between the school, the family, and religion. *Amici* are vitally concerned with how these issues are resolved in the context of public school graduation ceremonies. Such ceremonies are a time-honored event for families, undoubtedly the most significant family-centered event in any student's public school career. The involvement of the federal courts in prohibiting or allowing some forms of religious expression at graduation ceremonies has great potential either to preserve and strengthen the traditional bond between families and public schools, or to alienate families from the public schools.

STATEMENT OF THE CASE

The issue in this case is whether the Establishment Clause of the First Amendment to the United States Constitution prohibits prayer at graduation ceremonies held by public high schools and junior high schools.

For many years, public school graduation ceremonies in Providence, Rhode Island have included an invocation prayer and a benediction prayer offered by clergy of various faiths. The record in this case shows that prayers have been offered by representatives of a wide variety of the diverse religious traditions found in the Providence area (Respondent's Appendix A4-7). The prayers in this case were offered by a Jewish Rabbi, Leslie Gutterman, who invoked the name of God in the course of offering both the invocation and the benediction at the graduation ceremony of the Nathan Bishop Middle School on June 20, 1989.

A federal district court ruled that the graduation ceremony was conducted in violation of the Establishment Clause, because Rabbi Gutterman mentioned the name of God in the course of a public school function. See *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I. 1990). The district court interpreted this Court's Establishment Clause decisions to mean that "God has been ruled out of public education as an instrument of inspiration or consolation." *Id.* at 70.

The U.S. Court of Appeals for the First Circuit considered the district court's opinion to be "sound and pellucid" and therefore affirmed it. *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990). This Court has now agreed to review that decision.

SUMMARY OF ARGUMENT

The Establishment Clause of the First Amendment was enacted 200 years ago, in tandem with the Free Exercise Clause, to protect religious liberty. Since that time, the concept of "separation of church and state" has sometimes eclipsed religious liberty as the guiding principle for interpreting and applying the Establishment Clause.

The decision below exemplifies how the "separation" concept, applied without regard to the religious heritage of the American people and without respect for the religious liberty values underlying the First Amendment, leads to government hostility toward religion. Religious expression is singled out for censorship in the public square. Religiously oriented families receive, in a uniquely pointed fashion, the message that their values cannot be acknowledged in a public function. And a long-standing custom of many public school districts, which has never manifested any danger of establishing religion, is needlessly struck down.

The district court's premise that "God has been ruled out of public education" would impose a forced secularization and send a powerful anti-religious message to students. Such an extreme approach is not required by this Court's decisions. On the contrary, the Supreme Court has allowed room for religious expression and belief within the walls of the public schools—most recently by upholding the Equal Access Act.

Amici submit that the nature and purpose of the public schools make it especially important to allow types of religious expression that do not involve government coercion or government promotion of religion. Schools that foster discussion about moral issues and goals in life should not be forced to pretend that such matters have no religious dimension—nor should students feel intimidated about expressing their religious beliefs concerning such matters. Schools that seek to make students aware of the rich and diverse heritage of cultural tradi-

tions in America should not be forced to censor those that have a religious foundation or aspect. Pluralism and openness, not censorship and secularism, should be the hallmark of public schools.

The invocation and benediction at the graduation ceremony in this case are harmless, non-coercive ways for public schools to acknowledge the religious heritage of the American people. By allowing a diverse, rotating series of clergy to speak at graduation ceremonies, the Providence public schools made a commendable effort to acknowledge the traditions and beliefs of the families that send their children to the public schools. Such efforts should be welcomed, not condemned, by the courts. Nor should the courts attempt to censor or rewrite such prayers to remove the name of God or to conform to a notion of nondenominationalism or civil religion.

To condemn this graduation ceremony would imperil many other forms of religious expression on public occasions. Prayers at presidential inaugurations, prayers by legislative chaplains, and days of national thanksgiving and prayer would logically come under the same condemnation. This Court's past interpretations of the Establishment Clause leave ample room to allow such focus of religious expression. To the extent that the judicially-created standards in the *Lemon v. Kurtzman* case encourage lower courts to a misguided censorship of such religious expression, and of religious expression generally in the public school arena, the *Lemon* test should be reconsidered.

In advancing this position, *amici* and the families we serve do not ask the judiciary or any branch of government to support or promote our religious beliefs. Quite the contrary. The wellspring of religious faith and practice in America has never been the government, but rather the hearts of the American people and the inspiration of God. We seek from the government nothing more than a level playing field for religious belief vis-a-vis other beliefs.

ARGUMENT

I. THE DECISION BELOW ENFORCES AN EXTREME SEPARATION OF CHURCH AND STATE AT THE EXPENSE OF RELIGIOUS LIBERTY.

The First Amendment enshrines freedom of religion as one of the foremost rights enumerated in the Bill of Rights. In conjunction with the Fourteenth Amendment, the religion clauses of the First Amendment provide that government shall "make no law respecting an establishment of religion, nor abridge the free exercise thereof."

In recent decades, two competing visions of the purpose and nature of the Establishment Clause have battled for the minds and votes of the Justices of this Court. The first vision would interpret the Establishment Clause in tandem with the Free Exercise Clause to promote the common purpose for which they were both enacted. This common purpose is "to secure religious liberty," as Justice O'Connor observed in her concurring opinion in *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985).

The second vision would interpret the Establishment Clause to promote not religious liberty, but rather "secular liberty," as espoused by Justice Blackmun and a plurality of the Court in *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086, 3111 (1989). This view insists that all levels of government must be completely secularized, *id.* at 3110; judges following out this vision are repeatedly seen attempting to "ferret out religious influences in public life." McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 3. According to this view, the Establishment Clause requires uncompromising enforcement of the "separation of church and state."

The first vision recognizes that the phrase "separation of church and state" is nowhere contained in the Constitution. It maintains that a regime of total separation is neither possible nor desirable. See *Lynch v. Donnelly*, 465

U.S. 668, 672-73 (1984). This vision starts from the historical propositions that America has long been a haven for those seeking religious freedom, that Americans are by and large a "religious people whose institutions presuppose a Supreme Being," and that within certain tolerable limits, government may acknowledge the fact that religious beliefs are widely held among the American people. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

The first vision recognizes that, given the rich religious heritage of the American people, some contacts between government and religious expression are inevitable. See *Lynch v. Donnelly*, 465 U.S. at 672. In light of the extension of the modern state into many aspects of society, any effort to separate religion totally from government would exert a far broader impact than the framers of the First Amendment could have contemplated. The multiple contacts between government and religious expression would become an occasion to suppress religious expression. Thus, given the reality of government today, an extreme version of separation of church and state would work directly contrary to the interests of religious liberty.

Justices of this Court have accordingly warned against "a relentless extirpation of all contact between government and religion." *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. at 3135 (Kennedy, J., concurring in part and dissenting in part). To protect against this danger, the Court has espoused a guiding principle of "accommodation of all faiths and all forms of religious expression, and hostility toward none." *Lynch v. Donnelly*, 465 U.S. at 677.

The lower court decisions in this case follow an extreme version of the separationist view. The district court invoked the separation concept explicitly when it said that "God has been ruled out of public education as an instrument of inspiration or consolation." *Weisman v. Lee*, 728 F. Supp. 68, 70 (D.R.I. 1990). The court of

appeals, apparently sensing nothing improper in a complete separation of the public school arena from any mention of the name of God, praised the district court's decision and adopted it. *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990).

II. THE EXTREME SEPARATION VIEW MAKES PUBLIC SCHOOLS HOSTILE TO RELIGION AND SHOULD THEREFORE BE EMPHATICALLY REJECTED BY THIS COURT.

The extreme separationist view exemplified by the decision below has exerted a powerful influence upon public education. Decisions of courts and school administrators, as described below, have too often followed a harsh rule excluding all forms of religious expression from the public schools. As a result, many religiously inclined Americans who wish to support the public schools as institutions that strengthen a pluralistic democracy, find instead a pattern of censorship, secularized conformity, and hostility toward religion. This negative impact on families and students—who perceive the hostility first-hand—could easily be averted by clear guidance from this Court.

Evidence of public school hostility became abundant and conspicuous in the 1980's. Scholarly studies, judicial opinions, and Congressional hearings have combined to highlight the disturbing truth. In case after case, discrimination against religion has flowed from a misguided and simplistic assumption that all forms of religious expression must be separated from the public school environment. The following facts cry out for a clear pronouncement from the Supreme Court to restore pluralism and religious liberty in place of secularization and extreme separation.

The Congressional hearings on the Equal Access Bill in the mid-1980's led the Senate Committee on the Judiciary to conclude that many public school authorities across the country were suppressing religious speech within the schools and teaching students in effect "that

religious speech is taboo." S. Rep. No. 98-357, 98th Cong., 2d Sess. 12 (1984). The Committee found that "school authorities and organizations are beginning to prohibit students, both individually or in small groups, from engaging in any kind of religious speech at all." *Id.* at 16. The Committee described instances of students being reprimanded for private religious conversations with fellow students, students being prevented from praying together in a car on a school parking lot, and students being forbidden to carry personal Bibles on school property. *Id.* at 11-12. These obviously extreme examples, the Committee explained, resulted primarily from confusion in the minds of school administrators caused by decisions of the lower federal courts. *Id.* at 6.

Students and families quickly perceive the hostility toward religion inherent in such occurrences. As one high school student testified at the Committee's hearings:

We have been taught that the Constitution guarantees us freedom of speech. But we feel that here we have been discriminated against, because we can picket, we can demonstrate, we can curse, we can take God's name in vain, but we cannot voluntarily get together and talk about God on any part of our campus, inside or out of the school.

Id. at 10.

If students receive the impression that religious speech must be relegated to the "secret and clandestine," the Committee observed, free exchange of ideas will suffer, and intolerance toward religion will be fostered. *Id.* at 11-12. Moreover, the Committee found that a separationist view applied to the public schools "effectively denies that there may be a religious solution to many of the issues and problems the students must face" (*id.* at 18)—such as illegal drug use, abortion, violence, suicide, and depression (*id.* at 12). While public schools feel powerless even to acknowledge that there may be a religious dimension to solving such problems, recent studies in-

creasingly show the importance of taking religious beliefs into account when addressing these issues. See, e.g., Larson, Larson, Gartner, *Families, Relationships, and Health, Behavior and Medicine* 135, 140, 143 (D. Wedding ed. 1990). Modern experience confirms George Washington's insightful observation that "reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle." Fitzpatrick, *The Writings of George Washington from the Original Manuscript Sources 1745-1799 Farewell Address*, at 214, 229.

The concerns of the Senate Judiciary Committee appear all the more compelling when considered in light of the self-defined mission of the public schools. John Dewey, widely known for his impact (for better or worse) on American public education in this century, wrote that the public schools should "see to it that each individual gets an opportunity to escape from the limitations of the social group in which he was born, and to come into living contact with a broader environment." J. Dewey, *Democracy and Education* 24 (1916). America's public schools have long embraced a goal of bringing together children from families representing a wide diversity of faiths, philosophies, and ethnic heritage, and exposing them to different cultures and beliefs. In such an environment, an approach that censors and systematically excludes one particular viewpoint is anything but pluralistic. The result is hostility and secularism, not pluralism, when students are exposed to every possible belief, viewpoint, and behavior pattern—except those related to religious belief. The district court in this case admitted the hostile impact of its own decision, as students "might conclude that a deity is not an important part of their lives." 728 F. Supp. at 72 n.7.

The policy of forced exposure to non-religious views has been militantly enforced by the courts. Thus, there is no protection from exposure to views that are objectionable to a religiously oriented family. See *Mozert v.*

Hawkins County Board of Education, 827 F.2d 1058 (6th Cir. 1987). One federal court has stated the rule explicitly that under the Constitution there is "no legitimate interest in protecting any or all religions from views distasteful to them." *Cornwell v. State Board of Education*, 314 F. Supp. 340, 344 (D. Md. 1969), *affirmed*, 428 F.2d 471 (4th Cir. 1970), *cert. denied*, 400 U.S. 942 (1970). Viewed in this context, occasional exposure of public school students to religious beliefs of others will only balance the scales and present a fuller range of Dewey's "broader environment."

The separationist notion that religious speech is taboo in public schools has also led to artificial distortions of public school curriculum materials. A study by Dr. Paul C. Vitz under the auspices of the National Institute of Education documented the extreme lengths to which public school textbook publishers have gone to de-emphasize the role of religion in American life. See Vitz, *Religion and Traditional Values in Public School Textbooks*, *The Public Interest* 79-87 (Summer 1986) (reporting findings of NIE study). The result has been such ridiculous acts of anti-religious censorship as the substitution of "thank goodness" for the phrase "thank God" in a story (by Isaac Bashevis Singer) about a Jewish boy in eastern Europe (*id.* at 87) and the definition of pilgrims as "people who make long trips." *Id.* at 81. Dr. Vitz concluded, after reviewing the most widely used elementary school readers and social science texts, that the texts overwhelmingly exclude any reference to Jewish or Christian religion as a part of contemporary American life. *Id.* at 80, 86.

The solution to these problems is not government propagation of religion, but rather tolerance, openness, and true pluralism. The religion clauses of the First Amendment allow ample room both for acknowledgement of the religious values that exist among American families and for an openness to religious expression by non-government speakers within the public sphere.

The extreme separationist view, on the other hand, would make public schools into a hostile environment for a broad spectrum of American families. Families that want to pass on religious beliefs and values to their children face an uphill battle against their own government's institutions. Religiously inclined students and families confront the clear message that they are outsiders. Even the honestly inquisitive non-believing family, which merely wants children to experience the diversity and richness of cultural traditions in America, is deprived of this goal through government censorship of the religious aspects of that cultural diversity.

The hostility described above, however, is by no means required by this Court's decisions. The Court has acknowledged that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers." *Everson v. Board of Education*, 330 U.S. 1, 18 (1947). The Court's decision in the Pittsburgh creche and menorah case in 1989 explained that the decision "does not represent a hostility or indifference to religion but, instead, the respect for religious diversity that the Constitution requires." *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. at 3111.

This Court has upheld some measures aimed at ameliorating the hostility of the public schools toward religious expression. In *Board of Education of Westside Community Schools v. Mergens*, 110 S. Ct. 2356 (1990), the Court upheld the Equal Access Act, which sought to remedy some part of the hostility toward religious speech described in the Senate Judiciary Committee's report. The *Mergens* Court aptly observed that "the Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." 110 S. Ct. at 2371 (quoting *McDaniel v. Paty*, 435 U.S. 618, 641

(1978) (Brennan, J., concurring in judgment)). Earlier, in the case of *Zorach v. Clauson*, 343 U.S. 306 (1952), the Court upheld "release-time" programs for public school students for purposes of religious instruction off-campus. These decisions state the principle that should be the rule rather than the exception in the public schools: pluralism that allows room for religious expression by individuals and acknowledgement by schools of the religious heritage that is part of the cultural diversity of the American people. The contrary rule of extreme separation, as exemplified by the decisions below in this case, would make a mockery of pluralism by excluding from the public square anyone who takes religious belief seriously.

III. THE COURT SHOULD RESTORE BALANCE TO PUBLIC SCHOOLS BY ALLOWING FORMS OF RELIGIOUS EXPRESSION THAT NEITHER COERCE STUDENTS NOR OTHERWISE TEND TOWARD AN ESTABLISHMENT OF RELIGION.

This case provides the Court an opportunity to restore balance to the public schools with respect to religious expression. First, the Court should forthrightly reject the extreme separationist notion that all forms of religious expression must be excluded from the public schools. Second, the Court should allow those forms of religious expression that do not coerce students and that do not tend toward an establishment of religion. To the extent that the Court's three-part test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) has encouraged lower courts to strike down government measures that afford even-handed treatment to religious and nonreligious expression, that test should be reconsidered.

By any reasonable standard, the decision below should be reversed. The record shows a balanced approach by the Providence schools to present a wide variety of speakers for invocations and benedictions at graduation ceremonies (Respondent's Appendix A4-7). The prayers in

question are not composed, selected, or approved by government officials. *Cf. Lincoln v. Page*, 241 A.2d 799, 800 (N.H. 1968) (allowing invocations at town meetings). Accommodation of minority faiths is evident from the fact that the speaker in this case, Rabbi Gutterman, was representative of a relatively small religious minority in Rhode Island (*see* First National Survey of Religious Identifications of Americans, The Graduate School and University Center of the City University of New York (1991) (Religious Composition of State Populations 1990 indicates 1.6% of Rhode Island population are Jewish)).

Finally, the Court should reject any role for courts or other government officials in censoring or rewriting the religious content of prayers on public occasions, as the district court in this case suggested by redrafting the prayers to exclude the name of God (728 F. Supp. at 74-75 & n.10), and as the Sixth Circuit proposed in *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1410 (6th Cir. 1987) (requiring that prayers at public school graduations be "nondenominational"). Any attempt by government authorities to define a type of "permissible" religious content for prayer truly would tend to establish a favored brand of religion, even if that brand is soothingly labeled "nondenominational."

IV. FAILURE TO REVERSE THE DECISION BELOW WOULD JEOPARDIZE OTHER LONGSTANDING FORMS OF PUBLIC RELIGIOUS EXPRESSION.

If religious expression by a guest speaker at a graduation ceremony is prohibited by the Establishment Clause, there is no principled way to uphold the numerous other forms of public religious expression that have long been a part of the American scene. Prayers at presidential inaugurations, prayers by legislative chaplains, the inclusion of "under God" in the Pledge of Allegiance, and days of national thanksgiving and prayer are certainly not less offensive to an extreme separationist vision than the

prayers in this case. In many instances, these other forms of religious expression will be heard or read by school-age children—who will probably not have the protective influence of family members who are typically present at public school graduation ceremonies.

CONCLUSION

This case is a fitting occasion for the Court to affirm Justice O'Connor's admonition in the recent Pittsburgh creche and menorah case:

The Court has avoided drawing lines which entirely sweep away all government recognition and acknowledgement of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion.

County of Allegheny v. American Civil Liberties Union, 109 S. Ct. at 3117 (O'Connor, J., concurring).

Part II of this brief illustrates the vital importance of applying this principle in a balanced way to the public schools. By applying the principle to this case, the Court can do much to restore the credibility of the public schools as promoters of diversity and pluralism, rather than instruments of secularization. The decision of the court of appeals should therefore be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

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Respondents,

On Appeal From the United States
Court of Appeals for The First Circuit

**BRIEF AMICUS CURIAE
OF THE INSTITUTE IN BASIC LIFE PRINCIPLES
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICUS IN THIS CASE

The Institute in Basic Life Principles is a not-for-profit educational organization. During the past twenty-six years, the Institute has conducted seminars in major cities throughout the United States and Canada, and more recently on an international scope with 2.3 million alumni who have attended through word of mouth recommendations.

Eleven years ago, the Institute began conducting seminars designed especially for judges, attorneys, and legislators. These seminars were requested by public officials to help them deal with the special pressures which they are experiencing in their marriages, families and finances as a result of the eroding moral foundations of our nation. It is because of a keen awareness of the tragic consequences that are resulting from the disintegration of the universal, non-optional principles upon which our country was based that the Institute has an interest of *amicus* in this case.

Indeed history is replete with documented accounts of civilization which have crumbled as a result of violating the universal principles that were understood by our Founding Fathers and incorporated into the fabric of our Constitution and law system.

The Institute's particular concern in this case involves the detrimental precedent and subsequent decisions that have resulted from the three-prong test created in *Lemon v. Kurtzman*¹ The Institute strongly supports the position of the petitioners and requests that this honorable Court consider how the *Lemon* test is a deviation from the Framers' intent and carries with it serious consequences for our nation.

I.

**The Formation of the *Lemon*
 Test was an Aberration From
 the Framers' Intent**

The *Lemon* test, which was created to interpret the Establishment Clause of the First Amendment, does not reflect the wisdom of the Founding Fathers. As a result, decisions that have subsequently relied upon the *Lemon* test to interpret the Constitution have inherited its deficiencies.

This Court has long recognized the need to consult history in reaching decisions on questions of law. "It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . is not something to be lightly cast aside."² Justice Brennan has noted that in interpreting the First Amendment there is an added responsibility to make sure that the decision is "one which

¹ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

² *Walt v. Tax Commission*, 397 U.S. 664, 679 (1970).

accords with history and faithfully reflects the understanding of the Founding Fathers.”³

Although the *amicus* believes history clearly shows the intent of the Framers of the Establishment Clause, some Justices have questioned the use of history in this area of law, by claiming that historical evidence is too obscure. Justice Harlan once said, “the historical purposes of . . . the First Amendment are significantly more obscure and complex than this Court has heretofore acknowledged.”⁴ Justice Brennan has joined in this criticism of “Jurisprudence of Original Intention.”⁵ This “historic obscurity” doctrine, which engendered the *Lemon* test, was not formulated out of a desire to ignore the Framers’ intent. Rather, it was formulated to fill a perceived void in our understanding of that intent. As stated in *Lemon*, the test was created “in absence of clear constitutional prohibitions” and from “cumulative criteria developed by the Court over many years.”⁶

It is apparent that a test developed through admitted uncertainty of the Framers’ intent should never supersede historical evidence that disproves the presuppositions on which it was formulated. As Justice Frankfurter has so aptly stated, “. . . the ultimate touchstone of constitutionality is the

³ *Abington v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring).

⁴ *Flast v. Cohen*, 392 U.S. 83, 125 (1968) (Harlan, J., dissenting).

⁵ “It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions. All too often, sources of potential enlightenment such as record of the ratification debates provide sparse or ambiguous evidence of the original intention.” William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, Teaching Symposium, Georgetown University, Washington, D.C., October 12, 1985, p. 39.

⁶ “The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. In absence of a precisely stated constitutional prohibition, we must draw lines with reference to the three main evils . . .” *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

Constitution and not what we have written about it.”⁷ In the words of Chief Justice Rehnquist, “no amount of repetition of historical errors in judicial opinions can make the errors true.”⁸

If historical errors are found in the “cumulative criteria,”⁹ that were relied upon in the forming of a test, the test and its criteria should be abandoned. Such is the case with the *Lemon* test. “There is simply no historical foundation for the proposition that the Framers intended to build the ‘wall of separation’ that was constitutionalized in *Everson*.”¹⁰ As Chief Justice Rehnquist has noted, the test should be discarded.

The purpose of this *amicus* is to bring to this Court’s attention historic facts that seemingly were omitted in the creation of the *Lemon* test so that each of the three prongs can be analyzed to determine if they are consistent with the Framers’ intent in the Constitution.

A. Secular Purpose

The *Lemon* Court relied on its earlier rulings¹¹ to conclude that an act with no secular purpose is violative of the Establishment Clause. “The *Allen* opinion explains, however, how it inherited the purpose and effect elements from *Schempp* and *Everson*, both of which contain . . . historical errors.”¹²

⁷ *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring).

⁸ *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting).

⁹ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

¹⁰ *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting).

¹¹ As stated in *Lemon*, the test was developed from *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Abington v. Schempp*, 374 U.S. 203 (1963); and *Waltz v. Tax Commission*, 397 U.S. 664 (1970).

¹² *Wallace v. Jaffree*, 472 U.S. 38, 109 (1985) (Rehnquist, J., dissenting).

Justice Brennan recently stated that "the test is designed to ensure that the organs of government remain strictly separate and apart from religious affairs, for 'a union of government and religion tends to destroy government and degrade religion.'"¹³

The *Allen* decision states: "The test may be stated as follows: what [is] the purpose . . . of the enactment? If [it is] the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose . . . that neither advances nor inhibits religion."¹⁴

The Framers of the the Establishment Clause did not intend to prohibit legislative acts that lacked a secular purpose. In 1789, the first President of the United States and the president of the Constitutional Convention, proclaimed a national day of thanksgiving urging the nation to offer:

. . . prayers and supplications to the great Lord and Ruler of nations, and beseech Him to pardon our national and other transgressions . . .

President Washington then went on to exhort the newly formed government to:

. . . promote the knowledge and practice of true religion and virtue . . .¹⁵

¹³ *Lynch v. Donnelly*, 465 U.S. 668, 699 (1984) (Brennan, J., dissenting) quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

¹⁴ *Board of Education v. Allen*, 392 U.S. 236, 243 (1968).

¹⁵ James D. Richardson, *A Compilation of the Messages and Papers of the Presidents 1789-1897*, Vol. I (Washington D.C.: Bureau of National Literature and Art, 1901), p. 64.

As this Court has well stated, the First Congress "... was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument."¹⁶ The fact that the Proclamation was in response to a request of the First Congress, the day after the First Amendment was proposed is indicative of their intent for the Establishment Clause.

It is undeniable that there is no secular purpose for urging the nation to pray and repent of sin and for urging the government to promote religion and virtue. Had this Court used the *Lemon* test in 1789 to determine the constitutionality of President Washington's Proclamation, it would have come to the preposterous conclusion that in absence of a secular legislative purpose, the Framers of the Establishment Clause had violated the very Establishment Clause they had written.

In *Lynch* this Court noted that "[a] significant example of the contemporaneous understanding of that Clause is found in the events of the first week of the First Session of the First Congress in 1789. In the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid Chaplains for the House and Senate."¹⁷

It is apparent that the Framers of the Bill of Rights interpreted the Establishment Clause much more permissively than has this Court in recent years. They obviously considered a significant amount of religious affirmation in and by government to be consistent with the First Amendment.

¹⁶ *Myers v. United States*, 272 U.S. 52, 174-175 (1926) See also *Marsh v. Chambers*, 463 U.S. 783, 791 (1983) quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888).

¹⁷ *Lynch v. Donnelly*, 465 U.S. 668, 674-75 (1984).

It can hardly be thought that in the same week Members of the First Congress, who voted to appoint and pay a chaplain for each House and also approved the draft of the First Amendment for submission to the states, intended the Establishment Clause of the Amendment to forbid what they just declared acceptable.¹⁸

This interpretation of the Establishment Clause is not limited to its Framers, nor is it limited to the Eighteenth Century. Decades after its creation, this Court clearly recognized that the Establishment Clause is not a prohibition of government endorsement of religion. In 1844, this Court ruled in a case called, *Vidal v. Girard's Executors* which involved the bequest of an estate worth over \$7 million to the city of Philadelphia for constructing an orphanage. The bequest, however, stipulated that "no ecclesiastic, missionary or minister of any sect whatsoever shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises. . . my desire is, that all the instructors and teachers in the college shall take pains to instill in the minds of the scholars the purest principles of morality . . ." ¹⁹

The Court ruled that this stipulation could not be followed because the teaching of morality is inseparable from the teaching of Christianity:

The purest principles of morality are to be taught. Where are they found? Whoever searches for them must go to the source from which a Christian man derives his faith—the Bible. ²⁰

¹⁸ *Marsh v. Chambers*, 463 U.S. 783, 791 (1983).

¹⁹ *Vidal v. Girard's Executors*, 43 U.S. 127, 133 (1844).

²⁰ *Vidal v. Girard's Executors*, 43 U.S. 127, 153 (1844).

The presupposition that history is so obscure that purposes intended by the Establishment Clause cannot be clearly seen, should not be used as an excuse for open and blatant perversion of the Framers' intent. The undisputable facts of history demonstrate that the first prong of the *Lemon* test—requiring that government action maintain a secular purpose, contradicts the Framers' intent and thus should be abandoned.

B. Primary Effect

The second prong of the *Lemon* test, often called the primary effect prong, prohibits government action having the primary effect of endorsing religion. Like the first prong, the primary effect prong also finds its basis in *Allen*, which draws from *Everson* and *Abington*.²¹ In *Everson*, Justice Rutledge stated that the Framers intended "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."²² This presupposition, which is devoid of both historical documentation and legal precedent, was soundly refuted by Justice Goldberg in *Abington*:

As a matter of history, the First [A]mendment was adopted solely as a limitation upon a newly created National Government. The events leading to its adoption strongly indicate that the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments.²³

²¹ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

²² *Everson v. Board of Education*, 330 U.S. 1, 31-32 (1947) (Rutledge, J., dissenting).

²³ *Abington v. Schempp*, 374 U.S. 203, 373-374 (1963) (Goldberg, J., concurring).

James Madison's initial proposal sheds light on his intentions for the Establishment Clause.

The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed.²⁴

The Senate proposed the following versions:

Congress shall not make any law infringing the rights of conscience or establishing any religious sect or society.

Congress shall make no law establishing any particular denomination of religion in preference to another . . .

Congress shall make no law establishing one religious society in preference to others . . .

Congress shall make no law establishing religion . . .

Congress shall make no law establishing articles of faith or a mode of worship . . .²⁵

Finally a Conference Committee agreed on the following wording:

Congress shall make no law respecting an establishment of religion . . .²⁶

It is clear from these proposed amendments that it was not the intent of the Framers to bar religious observance and endorsement by creating a "wall of separation" between church and state. Rather, the purpose of the Establishment Clause, as clearly seen by its history, was to prohibit the establishment of a national religion.

²⁴ Edwin S. Gaustad, *Faith of Our Fathers*, pp. 157-158.

²⁵ *Id.*

²⁶ *Id.*

Madison's proposed amendment was opposed during debate in the House of Representatives. "Mr. Sherman thought the Amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the Constitution to make religious establishments . . ." ²⁷ Madison's response disproves the theory that he and the Framers intended to do more than bar the creation of a state religion:

Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.²⁸

Justice Joseph Story, who was appointed by the architect of the First Amendment, James Madison, stated that:

[T]he real object of the First Amendment was not to countenance, much less advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to an hierarchy the exclusive patronage of the national government.²⁹

The "separation doctrine" contravenes the intent of the Framers and the jurisprudence found in such cases as *Zorach v. Clauson*.³⁰ In *Zorach*, this Court stated that because our nation is made of . . .

religious people whose institutions presuppose a Supreme Being . . . [W]hen the state endorses and

²⁷ *Annals of Congress*, Vol. I, p. 730.

²⁸ *Id.*

²⁹ Joseph Story, *Commentaries on the Constitution of the United States*, 2nd ed., Vol II, Sec. 1877, p. 594.

³⁰ See *Zorach v. Clauson*, 343 U.S. 306 (1952).

encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their special needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.”³¹

The *Zorach* Court recognized that to prevent a “callous indifference,” government must condone and endorse religion. Without overruling or distinguishing *Zorach*, this Court in *Engel v. Vitale* stated that a “union of government and religion tends to destroy government and degrade religion.”³²

The Establishment Clause was not designed to bar government from endorsing religion, but rather, as Chief Justice Rehnquist has noted, it “forbade establishment of a national religion, and forbade preference among religious sects or denominations.”³³ The second prong of the *Lemon* test is simply a creation of this Court in the last 50 years and is devoid of any historical foundation.

Any attempt to portray the Framers’ intentions in the Establishment Clause as motivated by a desire to form a wall of separation between government and religion is soundly refuted by these facts. It is clear that the second prong of the *Lemon* test prohibiting the primary effect of an act from advancing religion, contravenes the intention of the Framers.

C. Excessive Entanglement

By its very name, the third prong of the *Lemon* test is a criterion of degrees. As this Court noted in *Lemon*, “total separation is not possible in an absolute sense. Some relationship between government and religious organizations

³¹ *Zorach v. Clauson*, 343 U.S. 306, 313-314 (1952).

³² *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

³³ *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

is inevitable.”³⁴ The third prong of the *Lemon* test finds its origins in *Walz v. Tax Commission*.³⁵

However, this basis and interpretation of excessive entanglement bears no affinity to the Court’s later ruling that a high impregnable wall be erected between church and state. In *Walz* this Court stated that taxing a church violates the First Amendment because it would foster “excessive government entanglement with religion.”³⁶

This jurisprudence of “limited separation” found in *Walz* was later reiterated by this Court in *Lynch*:

No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. “It has never been thought either possible or desirable to enforce a regime of total separation . . .” Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.³⁷

That the Framers intended for government to accommodate rather than tolerate religion is undeniable from the following observations by the Founding Fathers which are indicative of their definition of “excessive entanglement” of church and state:

George Washington—“Whereas, it is the duty of all nations to acknowledge the Providence of Almighty God, to obey His will, to be grateful for his benefits, humbly to implore his protection and favor . . .”³⁸

³⁴ See *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

³⁵ See *Walz v. Tax Commission*, 397 U.S. 664 (1970).

³⁶ *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970).

³⁷ *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) quoting *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973).

³⁸ James D. Richardson, *A Compilation of the Messages and Papers of the Presidents 1789-1897*, Vol. I, p. 64.

"Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of Men and Citizens."³⁹

John Jay—"The most effectual means of securing the continuance of our civil and religious liberties is, always to remember with reverence and gratitude the source from which they flow."⁴⁰

James Madison—"... the belief in God All Powerful wise and good, is so essential to the moral order of the World and to the happiness of man, that arguments which enforce it cannot be drawn from too many sources nor adapted with too much solicitude to the different character and capacities to be impressed with it."⁴¹

These quotes explain why the First Congress, which wrote and ratified the Bill of Rights, saw no deviation from the Constitution when they ratified Article III of the Northwest Ordinance on September 25, 1787, the very same day they ratified the First Amendment.⁴²

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.⁴³

³⁹ Washington, Farewell Address, September 17, 1796.

⁴⁰ John Jay to the Committee of the Corporation of the City of New York, June 29, 1826; quoted by William Jay, *Life of John Jay*, I:457-58.

⁴¹ Smylie, James H., *Madison and Witherspoon: Theological Roots of American Thoughts*, p. 125.

⁴² *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting).

⁴³ Andrew, W. Israel, *Manual of the Constitution of the United States*, App. 13.

Had the *Lemon* test been used to rule on the constitutionality of this act, the inevitable conclusion would be that the First Congress passed a bill that violated the First Amendment on the very same day that the First Amendment was proposed.

It is clear that what the *Walz* Court defined as excessive entanglement, the taxation of church property, has evolved into a constitutional test that is far from the Framers' intentions and has become an instrument to subvert religious expression.

Thomas Cooley's interpretations of the amendment is much closer to the Framers' intent:

But while thus careful to establish religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet in finite and dependent beings.⁴⁴

For these reasons, the Institute in Basic Life Principles respectfully asks that this Court re-examine the *Lemon* test in light of the Framers' intent.

⁴⁴ Thomas M. Cooley, *Constitutional Limitations*, Chap. XIII, p. 470.

II.

**Jurisprudence Since the
Formation of the *Lemon*
Test has Resulted in Rulings
that are Restrictive
of Religious Freedom.**

The Court in *Zorach v. Clauson*, predicted that if the First Amendment was interpreted to mean that "in every and all respects there shall be a separation of Church and State," the result would be a relationship in which "the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly."⁴⁵ After that prediction in 1952, history clearly demonstrates that the "wall of separation" has fostered unfriendly relationships between church and state.

Not only has the *Lemon* test created adversity between religion and state, it has done little to accomplish its purposes of creating uniform criteria that would lead to consistency in its decisions.

As noted by Chief Justice Rehnquist, "the wall idea might have served as a useful, albeit misguided analytical concept, had it led this Court to unified and principled results in Establishment Clause cases. The opposite, unfortunately, has been true; . . . since *Everson* our Establishment Clause cases have been neither principled nor unified."⁴⁶

The result of this "misguided analytical concept," the Chief Justice explains, is that "recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the 'wall of separation' is merely a 'blurred,

⁴⁵ *Zorach v. Clauson*, 343 U.S. 306, 312 (1952).

⁴⁶ *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting).

indistinct, and variable barrier,' which 'is not wholly accurate' and can only be 'dimly perceived.' " ⁴⁷

"[T]he *Everson* "wall" has proved all but useless as a guide to sound constitutional adjudication. It illustrates only too well the wisdom of Benjamin Cardozo's observation that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." ⁴⁸

"[N]o amount of repetition of historical errors in judicial opinions can make the errors true. The 'wall of separation between church and State' is a metaphor based on bad history, a metaphor which has proved useless a guide to judging. It should be frankly and explicitly abandoned."⁴⁹

Finally, in *Marsh v. Chambers*,⁵⁰ the Court declined to apply the *Lemon* test in ruling that prayer by a legislative chaplain did not violate the Establishment Clause. In his dissent, Justice Brennan agreed with the lower court's conclusion that all three prongs of the *Lemon* test had been violated:

In sum, I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional. ⁵¹

In effect the Court was faced with a decision to either 1.) apply the *Lemon* test and strike down an act as

⁴⁷ *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting).

⁴⁸ *Id.* at 108.

⁴⁹ *Id.* at 108.

⁵⁰ *Marsh v. Chambers*, 463 U.S. 783 (1983).

⁵¹ *Id.*, at 801-802 (Brennan, J., dissenting).

unconstitutional that the Framers clearly condoned themselves, or 2.) abandon the *Lemon* test to uphold a practice that had overwhelming historic foundations. By following the latter alternative, the Court upheld the intent of the Framers and demonstrated the fact that the *Lemon* test is unreasonable and contradictory of the Framers' intent.

Like the *Marsh* decision, application of the *Lemon* test creates a dilemma for this Court because it must ignore its own test in order to accomplish its goals of interpreting the Constitution. The fact that this Court in subsequent decisions has declined to apply the *Lemon* test because the effect of its application would clearly run afoul of its very goals, is further reason to discard this restrictive test and replace it with a more reasonable criterion.

As the Chief Justice states in *Wallace*, the *Lemon* Court, "attempted to add mortar to *Everson's* wall through the three-part test of *Lemon v. Kurtzman* . . . Thus the purpose and effect prongs, have the same historical deficiencies as the wall concept itself: they are in no way based on either the language or intent of the drafters."⁵²

The Institute in Basic Life Principles agrees with the Chief Justice's analysis and urges along with him that the *Lemon* test "frankly and explicitly be abandoned."⁵³

⁵² *Wallace v. Jaffree*, 472 U.S. 38, 109 (1985) (Rehnquist, J., dissenting).

⁵³ *Id.* at 108 (Rehnquist, J., dissenting).

CONCLUSION

In the case at bar, the decision of this Court hinges on the choice of whether to consult the Framers' intent, in which case the lower court's ruling would be overturned, or to follow the *Lemon* test, in which case the lower court's ruling would be upheld. The result of application of the *Lemon* test in this case further proves that the *Lemon* test, while claiming to protect society from government entanglement with religious affairs, in effect, restricts, rather than protects, religious liberty. The Institute in Basic Life Principles urges that this Court follow the intent of the Framers and overturn the decision of the lower court.

May 24, 1991

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(17)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ROBERT E. LEE, ET AL.,
v. *Petitioners,*
DANIEL WEISMAN, ETC.
Respondent.

On Writ of Certiorari to the United States
Court of Appeals For the First Circuit

**BRIEF AMICUS CURIAE OF THE STATE OF
DELAWARE IN SUPPORT OF PETITIONERS**

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IN THE
Supreme Court of The United States
October Term, 1990

ROBERT E. LEE, ET AL.,
Petitioners,
v.

DANIEL WEISMAN, ETC.
Respondent.

On Writ of Certiorari to the United States
Court of Appeals For the First Circuit

BRIEF AMICUS CURIAE OF THE STATE OF
DELAWARE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The State of Delaware has a significant interest in this case. Delaware, like Rhode Island, is charged by its state law with the obligation to provide primary and secondary education for its citizens. Del. Const. art. X, §1. For more than 150 years, many of Delaware's local school boards have

permitted, but not required, prayer in public school graduation ceremonies.

Delaware is both proud and mindful of the obligations imposed upon it by virtue of being one of the founding states. Indeed, that is reflected in its self-selected reference to being the "First State" to adopt the United States Constitution. Of particular application here is that Delaware has a unique, rich and diverse history of the coexistence of religion and government.

Although like ancient Attica, Delaware is territorially insignificant, yet like that classic land of noblest deeds, her soil has been the scene of many notable events, not only of local or state interest, but also of national concern and importance. More especially is this true of her contribution to the religious department of our national history. It is safe to say that no other of the thirteen original states witnessed the rise and early development of so many religious bodies.

Rhode Island may be called the early American home of the Friends, and Maryland of the Catholic Church, Virginia of Episcopalianism, New York of the Dutch Church, and Massa-

chusetts of Congregationalism; but it is a more note-worthy circumstance, that within the limited boundaries of Delaware, is to be sought the origin, and in part, the development in America of three religious denominations, viz., the Lutheran, the Presbyterian and the Methodist, and the founding of a fourth, the "Union Church of African Members," the first church in the United States organized and controlled wholly by colored persons. Its founder and first bishop, Peter Spencer, was born in this State, as also was the founder and first bishop of the Reformed Episcopal Church, David George Cummins; and the first Methodist bishop, who was a son of a Methodist preacher, Levi Scott.

2 H. Conrad, *History of the State of Delaware* 745 (1908). Delaware's unique historical perspective of great religious pluralism can be offered by no other state.

Prayer and religion are as much an unchangeable part of the history of the people of Delaware as is our constitutional government. This case provides an opportunity for thoughtful review of the constitutional standards for prayer at public school graduation ceremonies in the context of

preserving the coexistence of religion and government in Delaware and other states.

Delaware's General Assembly is sensitive to the proper need to avoid government establishment respecting religion. Indeed, such sensitivity is required not only by the first amendment to the United States Constitution, but by Delaware's state constitutional history as well.¹

¹ The *Declaration of Rights and Fundamental Rules of the Delaware State* enacted prior to the Bill of Rights on September 11, 1776 provided in Section 2:

That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings; and that no man ought or of right can be compelled to attend any religious worship or maintain any ministry contrary to or against his own free will and consent, and that no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner controul the right of conscience in the free exercise of religious worship.

Subsequently, Section 3 provided, "That all persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state, unless, under colour of religion, any man disturb the peace, the happiness or
(continued...)

Delaware believes that an invocation or benediction at a public school graduation ceremony can be appropriate without violating the first amendment to the United States Constitution. The House of Representatives and the Senate of the 136th General

¹(...continued)
safety of society."

Article I, Section 1 of the Constitution of the State of Delaware adopted in 1792 provided:

Although it is the duty of all men frequently to assemble together for the public worship of the Author of the universe; and piety and morality, on which the prosperity of the communities depends, are thereby promoted; yet no man shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent; and no power shall or ought to be vested in or assumed by any magistrate, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship, nor a preference given by law to any religious societies, denominations, or modes of worship.

The language of Article I, Section 1 of the Delaware Constitution of 1792 survived in the Delaware Constitutions of 1831 and 1897 except that the Constitution of 1897, Article I, Section 1, refers to "Almighty God" instead of "the Author of the universe."

Assembly of the State of Delaware, with the concurrence of the Governor, adopted a joint resolution in April, 1991 by the aggregate vote of fifty-nine affirmative, one negative and two abstentions supporting the right to have a benediction and invocation at public school graduation ceremonies and formally requesting the presentation of such position in an *amicus* brief in this case. *H.R.J. Res. 4, 136th Gen. Assembly (1991)*.

STATEMENT OF FACTS

Amicus Curiae adopts by reference the statement of facts set forth in Petitioners' Brief filed with this Court.

SUMMARY OF ARGUMENT

Prayer delivered by private individuals at public school graduation ceremonies is constitutional. The practice is not a product of affirmative governmental involvement; rather, it originated with the people.

Graduation prayer is as deeply entrenched in our national heritage as the prayer permitted in our legislative bodies.

By allowing the practice of graduation prayer to continue, state governments comply with the constitutional mandate that religious practices be accommodated. Graduation prayer does not implicate the evils against which the establishment clause protects or otherwise offend the Constitution.

ARGUMENT

I. AN INVOCATION OR BENEDICTION DELIVERED BY PRIVATE INDIVIDUALS AT PUBLIC SCHOOL GRADUATION CEREMONIES IS CONSTITUTIONAL UNDER EITHER THE LEMON OR MARSH ANALYSIS.

A. Introduction.

This Court has frequently observed the importance of historical practice in determining the constitutionality of conduct under the Establishment Clause of the first amendment. *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086

(1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Zorach v. Clauson*, 343 U.S. 306 (1952). In some instances that review has been dispositive of the issue. *Marsh*, 463 U.S. at 792-95. In others it has been an insightful tool in assessing the sensitivity of the conduct in question. *E.g.*, *County of Allegheny*, 109 S. Ct. at 3092; *Lynch*, 465 U.S. at 674-78. Even where the conduct has been ruled unconstitutional, this Court has taken great pains to note that such rulings are not meant to undermine the vital religious heritage and foundation of this country. *E.g.*, *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 212-14 (1963).

Governmental conduct permitting, but not requiring, a non-coercive public school graduation invocation or benediction could not have been conceived by our forefathers

as prohibited by the Bill of Rights. Indeed, our history shows that religious life and education have coexisted to such a degree that to conclude that a graduation ceremony must be held without prayer is inconsistent with our constitutional and historical precepts.

B. Prayer At Public School Graduation Ceremonies Is Constitutional Under *Lemon*.

In *Lemon v. Kurtzman*, this Court analyzed the constitutionality of two different statutory schemes which provided for state aid to non-public schools. 403 U.S. 602, 607-10 (1971). Generally, the statutes made state aid available for secular subjects in private religious schools, but forbid such aid for religious subjects. *Id.* at 610. The Court held that the statutes in question were unconstitutional because they excessively entangled state government with religion. *Id.* at 607.

The analysis adopted in *Lemon* provided that in order not to violate the Religion Clauses in the Constitution, any state statute must pass three tests. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.* at 612-13 (citations omitted).

The initial step in applying the *Lemon* analysis to the facts present here is to recognize that unlike *Lemon* this case does not concern the analysis of a statute. However, this Court has indicated that the *Lemon* analysis applies to governmental practices and policies as well as statutes. *County of Allegheny*, 109 S. Ct. at 3100 (practices); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981) (policies). This case does

not involve a practice or policy analogous to any in which this Court has applied the *Lemon* analysis.² This case involves whether

² Compare *Board of Education of the Westside Community Schools v. Mergens*, 110 S. Ct. 2356 (1990) (federal statute construed to permit student religious group to meet on school premises); *County of Allegheny*, 109 S. Ct. 3086 (holiday displays on county and city property); *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988) (federal legislation authorizing grants to religious and other institutions providing teenage sexuality counseling); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (Louisiana statute forbidding teaching in public schools of evolution unless accompanied by creationism instruction); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (Washington statute authorizing state commission to grant aid for vocational rehabilitation assistance at a religious college); *Aguillard v. Felton*, 473 U.S. 402 (1985) (federal funds used, *inter alia*, to send public school teachers into religious schools to provide remedial and clinical or guidance services); *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (Michigan school district adopting program that provides classes to non-public school students at public expense); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (Connecticut statute that has effect of subsidizing mission of sectarian schools); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Alabama statute authorizing period of silence for meditation or voluntary prayer); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (Massachusetts statute which vests veto power over liquor license applications in churches and schools); *Stone v. Graham*, 449 U.S. 39 (1980) (Kentucky statute authorizing purchase and posting of a copy of the Ten Commandments on the wall of each public school classroom); *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980) (New York statute

(continued...)

the voluntary choice, but not mandated use, of an invocation or benediction at public school graduation ceremonies violates the Religion Clauses of the Constitution.

The prohibitions of the Religion Clauses are directed to the government and not private conduct. "[T]here is a crucial difference between government speech endorsing religion which the Establishment Clause forbids, and private speech endorsing religion which the Free Speech and Free Exercise

²(...continued)

authorizing use of public funds to reimburse church sponsored and secular non-public schools for performing various state required services); *Meek v. Pittenger*, 421 U.S. 349 (1975) (Pennsylvania statute providing for state expenditures in connection with education of students in non-public schools); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) (New York statute which has effect of subsidizing mission of sectarian schools); *Hunt v. McNair*, 413 U.S. 734 (1973) (South Carolina statutory scheme aiding colleges by using bond financing for non-religious facilities construction); *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973) (New York statute providing for reimbursement of expenses incurred in connection with services required by state in non-public schools); *Sloan v. Lemon*, 413 U.S. 825 (1973) (Pennsylvania statute providing funds reimbursing parents for a portion of tuition expenses incurred in sending children to non-public schools).

Clause protect." *Westside*, 110 S. Ct. at 2372. It is necessary at the outset, therefore, to focus on the nature of the governmental action in question.

This case does not involve a state statute or state school board regulation requiring an invocation or benediction at graduation ceremonies. In Rhode Island, as in Delaware and presumably many if not all other states, the day to day operations of the public schools are entrusted to elected local school boards. The local school boards act within broad legal parameters established by the state and federal governments. See *Edwards v. Aguillard*, 482 U.S. at 605; *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 893 (1982) (Powell, J., dissenting). The selection of the faculty and the administration of the school rests with school boards which are subject to recall by

the voters. *Del. Code Ann. tit. 14, ch. 10* (1981). *Cf. Lemon*, 403 U.S. at 617-18.

The selection of an invocation and benediction at these Rhode Island schools is a function of the preferences of those involved with the ceremony. Sometimes prayer is included; sometimes it is not. *Respondent's Brief in Opposition to Petition For Writ of Certiorari* at 5. We believe Delaware's circumstances are similar. Neither the choice to allow commencement prayer nor the tradition of permitting such a decision to be made by local school boards can be deemed violative of any portion of the *Lemon* analysis.

Because the nature of Rhode Island's involvement in this case is not statutory or otherwise an affirmative practice or policy, it is difficult to literally apply the *Lemon* analysis in the present case. Notwithstanding that difficulty, it is evident that

Rhode Island's practice survives *Lemon* scrutiny. The decision as to whether to allow graduation prayer to be resolved by the people organizing graduation ceremonies serves the secular purpose of allowing our democratic process to function as intended. Also, graduation prayer itself serves "the secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring).

The prayer at issue here amply demonstrates that its principal or primary effect neither advances nor inhibits religion. Allowing a practice which has evolved as a historical tradition of the people to continue does not advance religion in any way. On the other hand, to abruptly delete prayer as part of these historically developed

ceremonies would certainly have the effect of inhibiting religion.

Finally, because of the permissive or "hands off" nature of the state involvement, there is no excessive government entanglement with religion by permitting graduation prayer. The school boards face a greater risk of the impermissible entanglement prohibited by *Lemon* by attempting to enforce the exclusion of the prayer in question than by permitting the present practice of choice to continue. *Widmar*, 454 U.S. at 272 n.11.

This Court considered similar arguments in *Westside* and strongly rejected the *Lemon* claim that:

because the school's recognized student activities are an integral part of its educational mission, official recognition of respondents' proposed club would effectively incorporate religious activities into the school's official program, endorse participation in the religious club, and provide the club with an official platform to proselytize other students.

110 S. Ct. at 2370. The analysis applicable to equal access for a student religious club applies with equal force to a momentary invocation and benediction at a public school graduation. The *Lemon* standards are simply not violated.

C. Permitting The Traditional Practice Of Prayer At Graduation Ceremonies To Continue Is Mandated By Marsh.

This Court has refused to "construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history." *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 671 (1970) (citing *Everson v. Board of Education*, 330 U.S. 1 (1947)). Accordingly, "[t]h[is] Court's interpretation of the Establishment Clause has [consistently]³ comported with what history

³ *Lemon* and *Marsh* are consistent in that both opinions relied to some degree on the historical tradition of the practice at issue. In *Lemon* (continued...)

reveals was the contemporaneous understanding of its guarantees." *Lynch*, 465 U.S. at 673.

Thus, in *Marsh*, this Court held that a statute which provided for a legislative chaplin, paid by the state, to give an invocation at the beginning of each legislative session was constitutional. 463 U.S. at 792-95. In so holding the Court relied heavily on the historical fact that the tradition of opening legislative sessions with prayer delivered by a paid chaplin originated in the first Continental Congress. *Id.* at 786-87. The Court also placed special emphasis on the fact that Congress voted in favor of the appointment of a chaplin only three days before it

³(...continued)

the Court was disturbed by the innovative nature of the statutes in question and the lack of a long history of the practice the statutes sought to establish. *Lemon*, 403 U.S. at 624-25. In *Marsh*, the Court placed heavy emphasis on historical tradition. *Marsh*, 463 U.S. at 786-92.

agreed on the final wording of the Bill of Rights. *Id.* at 788.

Hindsight reveals that the *Marsh* decision was an easy case. With regard to prayer at public school graduation ceremonies, however, reference to affirmative approval of the practice by Congress contemporaneous with the adoption of the Constitution appears to be historically impossible. State-established free public schools for the most part did not exist in the late 18th century when the Religion Clauses in the Constitution were adopted. *Wallace*, 472 U.S. at 80 (citing *Abington*, 374 U.S. at 238, and n.7 (Brennan, J., concurring)). Free public schools in Delaware were not created until 1829 when the Delaware General Assembly passed "An Act for the Establish-

ment of Free Schools in the State of Delaware."⁴

However, the same principles which guided our founding fathers in the adoption and maintenance of the custom of opening legislative sessions with prayer justify local school boards, if they so choose, in allowing prayer delivered by private citizens at graduation ceremonies to continue. "Marsh stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of

⁴ Although not well established at the time the Constitution was signed, public schools subsidized by taxes existed. A Warrant from Thomas Penn to the Inhabitants of Lewes [Delaware] dated June 23, 1736, established a property tax to support a public school. Although counsel has been unable to locate any concrete evidence to establish that prayer was included in graduation ceremonies at the Lewes School, it is unlikely that the Lewes School differed to any great degree from other schools of the era. Historical records indicate prayer at graduation ceremonies was common. For example, the graduation ceremony of a Swedish school in Delaware on April 8, 1718 was held at the house of John Stalcop in the presence of parents and a pastor. These exercises were opened with prayer by the pastor and with music. W. Powell, *History of Delaware* 384-85 (1928).

the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings." *County of Allegheny*, 109 S. Ct. at 3142 (Kennedy, J., dissenting) (footnote omitted). The Religion Clauses of the Constitution must coexist with deeply rooted historical practices, which in their modern form do not otherwise offend the Constitution.

Any historical analysis of this issue must acknowledge that the public education process in Delaware and the other founding states originated with the various churches. Indeed, in the early days of this country, "[i]ntellectual darkness would have reigned supreme — had not various churches been more alive to the importance of [public schools] than the government." M. Kane, *The Development of Secondary Education in Delaware Before 1900* 13 (1947) (available at the

Delaware Bureau of Archives and Records Management). In Delaware, as in these other states, many churches acted to fulfill the need for public education. Delaware is a true microcosm of the early states in the sense that religious schools started the tradition of graduation ceremonies incorporating prayer. That tradition has survived the establishment of free public schools and for more than 150 years thereafter. See generally Powell, *supra*, at 383-450.

Ironically, despite being established by the various denominations, there is evidence that the early schools in Delaware were established and maintained for primarily secular purposes as required by Lemon. For example, the Newark Academy evolved in the 1730's because of the Presbyterians' concern over "the lack of training for their own clergy as well as leaders for civil life in the Middle Colonies." *Letter of the Trus-*

tees of the Academy of Newark (October 19, 1773) (emphasis added) (available at the Delaware Bureau of Archives and Records Management). The school was open to youths of all religious denominations without distinction. *Id.* The Newark Academy apparently achieved its goal of training civil leaders as well as religious leaders. Graduates included Thomas McKean and George Read, both lawyers who signed the Declaration of Independence. C. Hoffeecker, *Delaware A Bicentennial History* 104 (1977).⁵

Since religious schools were the first source of public education in this country, it is such institutions from which we have inherited many traditions, including the graduation ceremony itself. The first

⁵ The curriculum of the early "religious" school was primarily secular. "The Wilmington Friends School, begun in 1748, grew from a curriculum featuring the three Rs to include the classics as the Quakers became more firmly established." Hoffeecker, *supra*, at 105.

graduation ceremony in this country took place at Harvard in 1642.⁶ J. Whitehead, *The Rights of Religious Persons in Public Education* 209 (1991) (citing A. Fink, *Evaluation of Commencement Practices in American Public Secondary Schools* 24 (1940)). The ceremony included a prayer given by the president of the institution. *Id.* When commencement exercises originated in public high schools in the 1800s, the high schools generally copied the university format, which included prayer. *Id.* (citing Fink, *supra*, at 20). As the graduation ceremony itself is a vestige of religious history it is not surprising that many parts of the ceremony which have religious significance, such as the processional, the wearing of

⁶ All the Ivy League schools except the University of Pennsylvania were started by one religious group or another. *The Rebirth of America* 41 (N. DeMoss ed. 1986).

robes and prayer, have survived the test of time. See *Id.* at 209-10.

Prayer has been part of graduation ceremonies in Delaware's public schools for more than 150 years. The tradition is well ingrained in the state's colleges and university as well. In 1885 the commencement of Wilmington High School began with a prayer. The commencement of No. 16 High School in 1897 began with prayer and also included a sermon to the graduation class. In 1836 the First Annual Commencement of Newark College (now the University of Delaware) began with a prayer. In 1869 the commencement of the State Normal University included an opening prayer and a benedic-

tion.⁷ *The Ephemera Collection* (available at the Historical Society of Delaware).

⁷ The tradition of including prayer as part of graduation ceremonies is deeply entrenched in Delaware's history. Records of the Historical Society of Delaware indicate that prayer has been widely accepted as part of commencement exercises in various primary and secondary schools throughout the State of Delaware. The promotion exercises of the William P. Bancroft School in 1947 included an invocation and a benediction. The commencement exercises of the Alexis I. Du Pont School in 1899, the Seaford High School in 1937, the Newark High School in 1938, the Henry C. Conrad School in 1939 and the Georgetown High School in 1962 all included an invocation and a benediction. Likewise, the commencement exercises of Wilmington High School in 1885, 1899, 1900-01, 1911, 1913, 1918, and 1935 all included prayer.

The dedication ceremonies of several schools included prayer. For example both the dedication of the Thomas F. Bayard School in 1925 and the George Gray School in 1926 included an invocation, dedicatory prayer, and a benediction. The dedication of the P.S. du Pont High School in 1935 included scripture reading, invocation, and a benediction. The dedication of the Lombard Elementary School in 1959 included a prayer of dedication and benediction. The dedication of the Evan G. Shortledge School in 1961 also included an invocation and a benediction.

The commencement exercises of Delaware College in 1843, 1845, 1846, 1847, 1848, 1915, 1918, and 1920 all included prayer. The Junior Exhibition of Delaware College in 1846 consisted entirely of prayer and music. The annual commencement of Newark College in 1839 and the commencement of Delaware Women's College in 1918 included prayer. *The Ephemera Collection* (available at the Historical Society of Delaware).

A brief noncoercive prayer given during the annual commencement of a public school does not violate the Religion Clauses of the Constitution any more than does permitting prayer at the beginning of legislative sessions or allowing the Pledge of Allegiance to be recited in our public schools. All of these traditions are an integral part of the history of this country. "'We are a religious people whose institutions presuppose a Supreme Being.'" *Marsh*, 463 U.S. at 792 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)). The prayer traditionally given at high school graduation ceremonies bears a striking resemblance to the acceptable reflections of our religious heritage which we permit to continue in our legislative and judicial ceremonies. Like the prayer and other references to religion included as a part of legislative and judicial ceremonies,

graduation prayer does not violate the Constitution.

II. THE PRACTICE OF PERMITTING PRIVATE INDIVIDUALS TO DELIVER PRAYER AT PUBLIC SCHOOL GRADUATION CEREMONIES COMPLIES WITH THE CONSTITUTIONAL MANDATE THAT GOVERNMENT ACCOMMODATE RELIGION; IT IS NOT STATE SPONSORED ESTABLISHMENT OF RELIGION.

A. Allowing Prayer At Public School Graduation Ceremonies Accommodates Our Diverse Historical Religious Culture.

"In this country, church and state must necessarily operate within the same community." *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring). The purpose of the Establishment and Free Exercise Clauses of the first amendment is to facilitate the coexistence of the two and "'to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other.'" *Lynch*, 465 U.S. at 672 (quoting *Lemon*, 403 U.S. at 614). "In every Establishment Clause case, [the Court] must

reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible." *Id.* at 672.

The United States Constitution "affirmatively mandates accommodation of religion, not merely tolerance, of all religions and forbids hostility toward any." *Id.* at 673. See *Wallace*, 472 U.S. at 68-69 (O'Connor, J., concurring) (purpose of Religion Clauses in Constitution is to secure religious liberty). Permitting prayer of the type at issue in this case comports with this mandate.

The practice of permitting prayer at graduation ceremonies, when in many years and in many schools in Rhode Island it is not chosen, does not endorse religion, favor some religion over others or promote reli-

gion. See *County of Allegheny*, 109 S. Ct. at 3100-01. Allowing the continued use of graduation prayer as it has evolved does not convey "a message of endorsement or disapproval." *Lynch*, 465 U.S. at 690. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Westside*, 110 S. Ct. at 2372. Even "[s]econdary school students are mature enough and are likely to understand that a school does not endorse or support . . . speech it merely permits on a nondiscriminatory basis." *Id.*

Rhode Island's practice of allowing but not requiring prayer is one of religious neutrality. Changing policy to affirmatively exclude graduation prayer "would demonstrate not neutrality, but hostility toward religion." *Westside*, 110 S. Ct. at 2371. "[H]ostility toward any religion or toward all religions is as much forbidden by the

Constitution as is an official establishment of religion." *Wallace*, 472 U.S. at 85 (Burger, C.J., dissenting).

To affirmatively outlaw such prayer would convey a message of disapproval of any type of public prayer. If it is simply "tolerable acknowledgement of beliefs widely held among the people of this country" to be able "[t]o invoke Divine guidance on a public body entrusted with making the laws," *Marsh*, 463 U.S. at 792, it seems wholly implausible that traditional graduation prayer celebrating such occasions is improper.

B. The Evils Against Which The Establishment Clause Protects Are Not Implicated By Graduation Prayer.

"Judicial caveats against entanglement must recognize that the line of separation [between church and state], far from being a 'wall' is a blurred, indistinct and variable barrier depending on all the circumstances

of a particular relationship." *Lemon*, 403 U.S. at 614. In considering whether to draw the constitutional line to prohibit prayer at public school graduation ceremonies this Court should reference the "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Id.* at 612 (quoting *Walz*, 397 U.S. at 668). None of these evils are implicated by allowing the voluntary choice of having, or not having, an invocation and benediction at graduation ceremonies.

The prayer in question occurs in an atmosphere that does not indicate state sponsorship of any specific religion or even religion in general. This case does not involve daily mandatory recitation of government composed prayer in the classroom. Graduation prayer as it has developed pre-

sents a far different case than classroom prayer. Compare *Engle v. Vitale*, 370 U.S. 421 (1962). This is not a case of classroom prayer with its different risks of peer pressure, delivery by school officials, or the fear of daily "indoctrination." See, e.g., *Grand Rapids*, 473 U.S. at 383-85; *Wallace*, 472 U.S. at 60 n.51; *Meek*, 421 U.S. at 369; *Abington*, 374 U.S. at 252-53 (Brennan, J., concurring). Like Presidential Proclamations, graduation prayer is "received in a noncoercive setting and [is] primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination." *Wallace*, 472 U.S. at 81 (O'Connor, J., concurring).

It is inconceivable that persons perceive the state as giving financial support to religion because a private, unpaid citizen gives a brief prayer during annual commencement exercises. Likewise, as discussed

infra, this case does not involve any active state practice. Graduation benedictions are certainly more innocuous than other more active government involvement previously held to be constitutional. See *Tilton v. Richardson*, 403 U.S. 682 (1971) (federal grants for buildings at church-sponsored colleges); *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970) (New York City tax exemption to religious organizations for religious properties); *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947) (New Jersey statute authorizing local school districts to create rule whereby parents are reimbursed for bus transportation of students to parochial schools).

CONCLUSION

Allowing the practice at issue to continue "follows the best of our traditions . . . [and] respects the religious nature of our people" *Zorach*, 343 U.S. at 314. Judicial invalidation of such an innocuous, nonthreatening practice will inevitably send a message of governmental hostility toward all religious practices, regardless of their nature. "[S]uch hostility w[ill] bring us into 'war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.'" *Lynch*, 465 U.S. at 673 (quoting *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 211-12 (1948)). The casualties of such a war are unpredictable.

It is laudatory and indeed necessary to prevent governmental establishment respecting religion. However, it is repugnant and ill-conceived to conclude that such protec-

tion requires fundamental religious fibers so clearly woven into this country's historical fabric to be torn from our nation's cloth at traditional public school graduation ceremonies.

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IN THE
Supreme Court Of The United States
October Term, 1990

ROBERT E. LEE, individually and as principal of the
Nathan Bishop Middle School, et. al.,
Petitioners

v.

DANIEL WEISMAN, personally and as next friend of
Deborah Weisman
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL
FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS

The National Legal Foundation is a public interest, non-profit law firm dedicated to the protection and preservation of religious liberties. The goal of the Foundation is to defend citizens' rights to pursue their faith free from unjust restraints and discrimination.

This commitment typically places the Foundation on the side of individual plaintiffs. Here, however, your *amicus* supports the legitimate and historically acceptable public acknowledgment of the religious heritage of this country embodied in the giving of an invocation and benediction at a public high school graduation ceremony. The Foundation opposes attempts to censor religion in public life and thereby convey government disapproval of religion.

The National Legal Foundation has participated as *amicus curiae* in several cases before both federal and state courts, including *Sands v. Morongo Unified School District*, No. S012721 (Sup. Ct. Cal. May 6, 1991), a case recently decided by the California Supreme Court concerning the same subject matter as this case. The Foundation has also directly litigated for religious liberty, including the U.S. Supreme Court case of *Board of Education of Westside Community Schools v. Mergens*, 110 S.Ct. 2356 (1990), addressing the constitutionality of the Equal Access Act of 1984, 20 U.S.C. section 4071 et seq.

Counsel of record for *Amicus Curiae* is Robert K. Skolrood. He is licensed to practice in Illinois, Oklahoma,

Virginia, the District of Columbia, the United States Supreme Court, as well as numerous U.S. Circuit Courts of Appeal and District Courts.

The National Legal Foundation believes the experience of its attorneys will be of assistance to the Court in evaluating this case.

ISSUE PRESENTED

Does the inclusion of a traditional invocation and benediction in a public school graduation ceremony violate the First Amendment to the United States Constitution?

SUMMARY OF ARGUMENT

The opinion of the First Circuit Court of Appeals affirmed, without elaboration, the opinion of the District Court. *Weisman v. Lee*, 908 F.2d 1090 (1990). As such this brief will cite the District Court's opinion for details of the lower court's holding on the issue. That holding

imposes a *per se* banishment of references to a deity from public graduation ceremonies in the Providence, Rhode Island schools. This approach does not comport with the current fact-sensitive, context-oriented approach to First Amendment Establishment Clause cases employed by the United States Supreme Court, nor with a historical analysis of invocations and benedictions as practiced by the Framers of the First Amendment. While *Amicus* National Legal Foundation does not agree that the three-part *Lemon* test is the proper basis of analysis regarding the Establishment Clause, this brief will analyze the present case in light of current precedents which utilize the modified *Lemon* test.

Evaluation of the present case requires a consideration of the total context and setting within which the invocations and benedictions at issue occur, not merely a focus on the religious content of those prayers. Such a context-oriented inquiry shows that traditional invocations and benedictions have neither the purpose or effect of endorsing religion. This context-oriented endorsement inquiry is fully applicable in the school setting and does not require extirpation of religion from

speech at school functions. Students are capable of discerning the difference between endorsement and traditional ceremony.

The history of invocations and benedictions in American public ceremony and education, as part of the context in which the reasonable observer evaluates the purpose and effect of a challenged practice, further supports a finding of no impermissible purpose or effect of endorsing religion. History also suggests that invocations and benedictions are not the type of activity which the Framers of the First Amendment intended that provision to prohibit. Neither history nor law regarding "Separation of Church and State" require the removal of benign recognition of a deity or religious speech from public ceremonies.

The Court of Appeals' opinion, being based wholly on the opinion of the District Court, incorrectly applies federal law to effectively censor religious speech from this public ceremony. Such censorship is not neutrality, but hostility to religion forbidden by the First Amendment. The Court of Appeals should be reversed as more fully set forth below.

ARGUMENT

I

INCLUSION OF AN INVOCATION AND BENEDICTION IN A HIGH SCHOOL GRADUATION CEREMONY IS APPROPRIATE UNDER CURRENT FIRST AMENDMENT JURISPRUDENCE.

In evaluating the present case for a violation of the First Amendment,¹ the court below relied upon the three part test set forth by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *Weisman v. Lee*, 728 F.Supp. 68, 71 (D.R.I. 1990). The United States Supreme Court recently reaffirmed its reliance on the *Lemon* test in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 592 (1989). Application of the *Lemon* test, as refined in the *County of Allegheny* case, shows that inclusion of an invocation and benediction in a public high school graduation ceremony is constitutional because it has a secular purpose, does not have the effect

¹The First Amendment to the United States Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

of endorsing religion and does not excessively entangle the public schools in religious affairs.

A. THE INVOCATION AND THE BENEDICTION IN THE GRADUATION CEREMONY DO NOT HAVE THE PRIMARY PURPOSE OR EFFECT OF ENDORSING RELIGION.

The first two prongs of the *Lemon* test examine the primary purpose and effect of the challenged action. In *County of Allegheny*, the United States Supreme Court, unifying its various holdings under the Establishment Clause, employed a clarification of these two prongs first articulated by Justice O'Connor in her concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984), which has been termed the "endorsement test." *County of Allegheny*, 492 U.S. at 592-593 ("we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion"); *Id.* at 597 ("our present task is to determine whether the display of the creche and the menorah... has the effect of endorsing or disapproving religious beliefs.")

Under the "endorsement" clarification of Justice O'Connor, adopted by the Court in *County of Allegheny*:

The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.

Lynch, 465 U.S. at 690 (O'Connor, J. concurring). The test is, therefore, analogous to the concept of "facial" versus "as applied" challenges to statutes. See *Bowen v. Kendrick*, 487 U.S. 589, 593 (1988).

PURPOSE

To determine whether or not a challenged practice has the impermissible purpose or effect of "endorsing religion" the Court has stated that "Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion." *County of Allegheny*, 492 U.S. at 596, citing *Lynch*, 465 U.S. at 694 (O'Connor, J. concurring). See also *County of Allegheny*, 492 U.S. at 625. (O'Connor, J. concurring in part, and concurring in the judgment). Thus, the Court in *County of Allegheny* carefully examined the "particular context" of the Christmas displays at issue, upholding display of the

menorah and forbidding display of the creche. *Id.* at 620-621.

Except in Judge Bownes' concurring opinion on appeal, *Weisman*, 908 F.2d at 1094-95, the Court below did not address the first prong of the *Lemon* test. *Weisman*, 728 F.Supp. at 71. The concurrence on appeal focused exclusively on the religious aspect of the invocation, invalidating it on that ground. Fully applying the endorsement test adopted by the United States Supreme Court to this case, however, it is clear that the school did not have as its actual purpose the endorsement of religion. There is no evidence that any school official sought or seeks to proselytize any student through the invocation or benediction. This is celebratory setting, not a pedagogical one. In fact, school officials have gone out of their way, through distribution of "Guidelines for Civic Occasions" to graduation speakers, to ensure that the school has no actual purpose of endorsing religion.

The court below failed to note Justice O'Connor's observation in *Lynch* that "government acknowledgments of religion [legislative prayers, opening court with prayer] serve, in the only ways reasonably possible in our culture,

the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in our society. For that reason and because of their history and ubiquity, these practices are not understood as conveying government approval of particular religious beliefs." *Lynch*, 465 U.S. at 693 (O'Connor, J. concurring). Justice O'Connor in no way suggested that elimination of reference to a deity was necessary to achieve this proper purpose.

EFFECT

Inclusion of an invocation or benediction in this graduation ceremony also does not "in fact [convey] a message of endorsement or disapproval" of religion and thereby have the impermissible effect of endorsing religion. *Lynch*, 465 U.S. at 490 (O'Connor, J. concurring). This second prong of the *Lemon* test was the sole focus of the court below. *Weisman*, 728 F.Supp. at 71. The opinion for the court below, however, failed to note that the primary effect was congruent with the secular purpose: The invocation and benedictions set a solemn

tone for the graduation ceremony and therefore do not have the primary effect of advancing religion.

This conclusion is supported by the fact-specific, context oriented inquiry required under the endorsement test. First, the invocation prayers did not occur in a "repetitive or pedagogical" context, and were not part of a program of "calculated indoctrination" but rather were a brief and peripheral part of a ceremonial function. *Grossberg v. Deusebio*, 380 F.Supp. 285, 288-89 (E.D. Va. 1974). In fact, high school graduation ceremonies for the Providence Schools do not even occur on school property. Attendance at the ceremony is voluntary and parents, friends, and other interested individuals are in attendance. The graduation ceremony occurs only once a year. By contrast, cases relied on by the plaintiffs and the court below involved daily state-mandated and state directed devotional exercises or teaching in a classroom setting without parental or community presence. *Engel v. Vitale*, 370 U.S. 421 (1962) (prayer); *Abington v. Schempp*, 374 U.S. 203 (1963) (prayer and Bible reading); *Wallace v. Jaffree* 472 U.S. 578 (1985) (prayer); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (state required teaching of creation

science). *Grand Rapids School Dist. v. Ball* 473 U.S. 373 (1985) (public school teachers in parochial school classrooms).

Second, a comparative analysis with other state actions, in the school and non-school context, which were held not to have the effect of endorsing religion, further supports a finding of no impermissible effect of endorsement. *Lynch*, 465 U.S. at 681-82. Thus, the objective observer would perceive no greater endorsement of religion by practice of invocations and benedictions than expenditure of public funds for textbooks for students attending parochial schools, *Board of Education v. Allen*, 392 U.S. 236 (1968); expenditure of public funds to transport students to parochial schools, *Everson v. Board of Education*, 330 U.S. 1 (1947); and, in the non-school context, expenditure of public funds for legislative chaplains, *Marsh v. Chambers*, 463 U.S. 783 (1983). See *Lynch*, 462 U.S. at 681-82 for additional examples.

Examining both what the school district "intended to communicate" in allowing the invocations and benedictions and "what message [was] actually conveyed,"

Lynch 465 U.S. at 490 (O'Connor, J. concurring), it is clear that the invocations have neither the purpose or effect of endorsing religion. The practice does not place the school board in the position of "appearing to take a position on questions of religious belief or . . . 'making adherence to a religion relevant in any way to a person's standing in the political community,'" *County of Allegheny*, 492 U.S. at 595, citing *Lynch* 465 U.S. at 687 (O'Connor, J. concurring). Here, the use of invocations and benedictions within the context of a traditional celebratory setting of graduation indicates no intent or effect of endorsing religion just as display of religious paintings in the National Museum of Art does not indicate government endorsement of the content of the paintings. *Lynch* 465 U.S. at 692 (O'Connor, J. concurring).

B. THE ENDORSEMENT ANALYSIS IS FULLY APPLICABLE IN THE PUBLIC SCHOOL SETTING.

Plaintiffs and the court below fail to apply the controlling "endorsement" inquiry in their analysis. Focusing narrowly on the premise that the challenged

invocations and benedictions mention a deity and are therefore religious, the plaintiffs and the court proceed to argue that absolutely no permissible purpose or effect is possible in the school setting. *Weisman* 728 F.Supp. at 72.

First, the contention that public bodies must always use non-religious or the least religious means to accomplish secular goals is clearly erroneous. The United States Supreme Court has specifically rejected the notion that the government must employ the "least-religious-means" to achieve proper secular goals. *County of Allegheny*, 492 U.S. at 676 n.12 (Kennedy, J. dissenting); *Id.*, 492 U.S. at 636 (O'Connor, J. concurring in part, and concurring in the judgment). As Justice O'Connor stated in rejecting this requirement, "My conclusion [upholding constitutionality of displaying the menorah] does not depend on whether or not the city had 'a more secular alternative symbol' of Chanukah... In my view, Justice Blackmun's new rule, *ante*, at 492 U.S. 618, that an inference of endorsement arises every time government uses a symbol with religious meaning if a 'more secular alternative' is available, is too blunt an instrument for Establishment Clause analysis, which depends on

sensitivity to the context and circumstances presented by each case." *Id.*, 492 U.S. at 636.

As stated by the Court in *Lynch*, focusing "exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Id.*, 465 U.S. at 680. The Court in *Lynch* termed the District Court's inference of improper purposes solely from the religious nature of the creche "clearly erroneous." *Lynch*, 465 U.S. at 681, and emphatically rejected the dissent's parallel argument:

Justice Brennan argues that the city's objectives could have been achieved without including the creche in the display.... True or not, that is irrelevant. The question is whether the display of the creche violates the Establishment Clause.

Id., 465 U.S. at 681 n.7. Justice O'Connor has gone so far as to assert that use of an available secular symbol of Chanukah might be viewed as mocking that observance and that in fact:

[T]he more *religious* alternative may, depending on the circumstance, convey a message that is least likely to implicate Establishment Clause concerns.

County of Allegheny, 492 U.S. at 636-637 (O'Connor, J. concurring in part and concurring in the judgment) (emphasis in the original).

The application to the present case is readily apparent. Use of a prayer referring to a deity to invoke or conclude a graduation ceremony does not in and of itself render the ceremony unconstitutional. "Focus on the specific practice in question in its particular physical setting and context," is required to determine whether endorsement has occurred. *County of Allegheny*, 492 U.S. at 637 (O'Connor, J. concurring in part and concurring in the judgment). Given the historical use of prayers in invoking public ceremonies, including graduations (See discussion in Part II, p. 29 below) exclusion of the prayers could, in fact, be interpreted as disapproval of religion, implying that religious discourse somehow holds a second-rate status in the public arena. Such a position calls to mind the admonition of Justice Brennan's concurrence in *McDaniel v. Paty*, 435 U.S. 618, 641 (1978), "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American

ideals and therefore subject to unique disabilities." *Id.*, 435 U.S. at 618. Or as Justice O'Connor stated in *County of Allegheny*, the Court "has avoided drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion." *Id.*, 492 U.S. at 623. Government need not paganize or secularize all public speech.² Context is sufficient to remove any implication of endorsement.

The "endorsement test" for assessing the purpose and effect prongs of the *Lemon* test, as set forth in *County of Allegheny*, is fully applicable to the public school setting.

²Because religious content alone does not necessarily indicate endorsement, it is unnecessary for courts to review "the content of prayers to judicially approve what are acceptable invocations to a deity." *Weisman*, 728 F.Supp. at 74.

The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

Marsh v. Chambers, 463 U.S. 783, 794-5 (1983). Under the endorsement inquiry, it is not the religious content of the prayer that is the focus of the inquiry, but rather the total context within which the prayer occurs. Therefore, *Marsh* may be harmonized with the endorsement inquiry, despite no reference to *Lemon*'s 3 prong test. See *County of Allegheny* 492 U.S. at 596 n.46.

This is clearly demonstrated by the repeated citations to school-based cases in the Court's opinion setting forth the endorsement inquiry. *County of Allegheny*, 492 U.S. at 592-597.

The Court in *Lynch* vividly demonstrated the application of the endorsement inquiry in the context of the public school by reference to its decisions in *Stone v. Graham*, 449 U.S. 39 (1980) (*Per curiam*) and *Abington School District v. Schempp*, 374 U.S. 203 (1963). *Lynch*, 465 U.S. at 679. In *Stone*, the Court invalidated a state statute requiring the posting of the Ten Commandments on classroom walls because they were posted purely as a religious admonition. The Court stated, however, that though the Ten Commandments are "undeniably a sacred text in the Jewish and Christian faiths," (see discussion above on use of religious means), the Commandments could have been "integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. *Stone*, 449 U.S. at 41-42. Similarly, the Court in *Abington*, after striking down required devotional Bible readings "noted that nothing in

the Court's holding was intended to 'indicat[e] that such study of the Bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistently with the First Amendment.'" *Lynch*, 465 U.S. at 679-80, citing *Abington*, 374 U.S. at 225.

As the discussion of *Stone* and *Abington* in *Lynch* indicates, it is not the presence of religion or a reference to deity in a public school that is forbidden, because the Bible, a religious document replete with references to God, could be utilized in the classroom in proper context. The key focus is whether the particular setting and context in which the religious activity at issue is employed has the purpose or effect of communicating endorsement. All of the United States Supreme Court cases cited by the court below involve daily state-mandated and directed devotional exercises or teaching in a closed classroom setting. *Engel, supra.* (state required prayer); *Abington, supra.* (state directed Bible reading); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (state required prayer); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (state required teaching of creation science). *Grand Rapids School dist. v. Ball, Supra.*

(public teacher instructing in parochial classrooms). As the Court noted in *Edwards*, the daily classroom setting is particularly susceptible to conveying a message of endorsement because, "The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Id.*, 482 U.S. at 584. But see *Stone*, 449 U.S. at 42, *Abington*, 374 U.S. at 225 and the discussion above. See also *McCullum v. Board of Education*, 33 U.S. 203, 236 (1948) (Jackson, J. concurring). ("Certainly a course on English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren."); *Crockett v. Sorenson*, 568 F.Supp. 1422 (W.D. Va 1983); and *Florey v. Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980) for uses of religion and references to a deity in a classroom setting. Absolutely none of the cases of the United States Supreme Court cited by the court below stands for the proposition that public schools must be "religion-free" zones. Rather, each case plaintiffs rely on has examined the unique daily devotional exercise or teaching in a

classroom setting to find a purpose or effect of endorsement under the facts of that case.

Many lower federal courts which have dealt with prayer at school functions, such as the court in *Jager v. Douglas County School Dist.*, 862 F.2d 824 (11th Cir. 1989) cert. den., 109 S.Ct. 2431 (prayer before football games) have utterly failed to apply the careful fact specific inquiry required under the endorsement analysis. Instead, they have adopted a *per se* banishment of religion from school grounds which does violence to the careful analysis established in *County of Allegheny*. The *per se* analysis employed by the District Court in this case, banishing all reference to a deity from the ceremony, communicates a purpose and effect of disapproving religion in public life. By contrast, the U.S. Supreme Court, as noted earlier, "has avoided drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion." *County of Allegheny*, 492 U.S. at 623 (O'Connor, J. concurring).

On the facts of this case, the lower court was wrong in concluding that inclusion of a traditional invocation or

benediction had the effect of endorsing religion. The court failed to properly examine the "particular context" of the graduation ceremony but rather employed the blunt, simplistic, *per se* approach to this case advocated by plaintiffs below and courts such as the court in *Jager*.

C. PUBLIC SCHOOL STUDENTS ARE MATURE
ENOUGH TO DISTINGUISH
IMPERMISSIBLE ENDORSEMENT FROM
TRADITIONAL CEREMONY

A fundamental misconception occurs if this matter is viewed as involving the type of mandatory classroom prayer or devotional exercises which have been held unconstitutional by the U.S. Supreme Court. In such cases, the Court has been properly concerned with truly impressionable children, as young as kindergarten or other primary grades, undergoing clearly religious devotional exercises on a daily basis for year after year of school attendance. At issue here, however, are brief, 30-60 second traditional invocations and benedictions in middle school and high school graduation ceremonies. It is thus not credible or persuasive to simply apply the same concerns regarding impressionable children to such a

ceremonial context involving young adults. The court below fails to recognize the maturity level of modern students. *Weisman*, 728 F.Supp. at 72.

Society itself, as exemplified by common law or statute, certainly does not view or treat young adults as so inherently "impressionable" as to be remotely capable of "indoctrination" by a thirty (30) to sixty (60) second invocation or benediction in the context of ceremonial pomp and circumstance. When attending the ceremony, many of the graduates are either eighteen (18) years of age, or will turn eighteen (18) shortly. Many such young adults will soon be college freshmen.

By way of example, all eighteen (18) year old young adults from the Providence schools are deemed mature and responsible enough to: vote (U.S. Const., amend XXVI, R.I. Gen.Laws Section 17-1-3); serve in the armed forces (10 U.S.C. 505); operate a motor vehicle (R.I. Gen.Laws Section 30-10-3); marry (R.I. Gen. Laws Section 15-2-11); consent to certain medical care for themselves and their children (R.I. Gen. Laws Section 23-4.6-1); and, in certain cases, to consent to an abortion,

perhaps one of life's most difficult and complex choices (RI Gen.Laws Section 23 - 4.7-6).

Lower federal courts, such as the court in *Doe v. Aldine Independent School District*, 563 F.Supp. 883 (S.D. Tex. 1982), and the court below have cast students as hopelessly impressionable. The court in *Doe* manufactured a nonexistent Supreme Court quotation, supposedly found in *Roemer v. Board of Public Works* 426 U.S. 736 (1976), at pages 750 and 754 to "support" this proposition. See *Doe*, 563 F.Supp. at 887.

All the Supreme Court decisions actually citing impressionability concerns involved a school context of daily, state mandated and directed devotional exercises in a closed classroom with students from first grade upward. Where, as here, the context is not daily pedagogy and only older students, in fact graduates, are involved, the Supreme Court and other federal courts have recognized that students are mature enough to make sponsorship distinctions. *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969) (no danger that high school students' symbolic speech implied endorsement); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 556 (1986)

(Powell, J. dissenting) (four years difference between high schoolers and college age students irrelevant); *Board of Education v. Pico*, 457 U.S. 853 (1982) (existence of controversial books in the library does not constitute school endorsement of content). *Mergens v. Board of Education of Westside Community Schools*, 110 S.Ct. 2356, 2372 (1990) (proposition that schools do not endorse everything they fail to censor is not complicated).

The present case parallels the challenge raised and rejected in *Evans v. Selma Union High School Dist. of Fresno County*, 222 P. 801 (Cal. 1924) (*Per Curiam*) where the Supreme Court of California upheld the purchase of King James Bibles for a public high school library. Such a purchase surely "benefited" Protestant Christianity by making its primary sacred text readily available to students, but such "benefit" was merely an incident of the primary public purpose of making a literary classic accessible to students. Just as the "mere act of purchasing a book to be added to the school library does not carry with it any implication of the adoption of the theory or dogma contained therein, or any approval of the book itself," *Id.* at 803, inclusion of an invocation in graduation

exercises for the legitimate purpose of solemnizing the occasion does not imply that the school endorses the message therein or approves of the prayer or its speaker.

The graduating students of the Providence school system are capable of discerning the difference between impermissible endorsement and traditional celebration of an important civic event. The fears of indoctrination expressed by the plaintiffs and the court below have no basis in fact or law.

D. INCLUSION OF AN INVOCATION AND BENEDICTION IN THE GRADUATION CEREMONY DOES NOT EXCESSIVELY ENTANGLE THE SCHOOL IN RELIGION.

Except in Judge Bownes' concurring opinion on appeal, *Weisman*, 908 F.2d at 1095, the Court below did not address this prong of the *Lemon* test. *Weisman*, 728 F.Supp. at 71. The concurring judge's conclusive remarks regarding excessive entanglement in the present case failed to recognize the fact that this court has only found excessive entanglement where there is an ongoing relationship between government and religion as noted in

Lemon, below. Complete separation of religion from the state is impossible. *Lemon*, 403 U.S. at 614. "Some relationship between government and religious organizations is inevitable." *Id.* Only "excessive" entanglement is prohibited. *Walz v. Tax Commission*, 397 U.S. 664, 675 (1970); *Lemon* 403 U.S. at 615. To be excessive, alleged entanglements must be in the nature of a regular relationship with "comprehensive, discriminating, and continuing state surveillance" of the challenged activity. *Lemon*, 403 U.S. at 619.

The facts of this case show no "excessive" entanglement. The graduation ceremony occurs once a year. Remuneration from state funds is for the purpose of the ceremony generally, not the invocation or benediction particularly and would be spent regardless of their inclusion. The school does not dictate the content of the invocation or benediction. The school does provide the booklet "Guidelines for Civic Occasions" to prospective speakers. There is no pre-approval procedure to which speakers must submit. The fact that school employees choose the speaker is irrelevant. A graduation ceremony is not a random event that occurs without planning.

Choice does not equal *per se* entanglement, just as President George Bush's choice of Billy Graham to deliver a prayer at his inauguration does not equal entanglement.

Plaintiffs argued below that the invocations are "divisive" and therefore entangle the state in religion. While divisiveness was raised as an issue in *Lemon*, the United States Supreme Court "has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct." *Lynch* 465 U.S. at 684. The Court had specifically limited this inquiry to cases involving state aid to parochial schools. *Mueller v. Allen*, 463 U.S. 388, 404 n. 11, and noted that this inquiry was subject to abuse because litigants could "by the very act of commencing a lawsuit . . . create the appearance of divisiveness and then exploit it as evidence of entanglement." *Lynch* 465 U.S. at 684-85. Justice O'Connor's concurrence in *Lynch* specifically rejected the divisiveness element. *Id.*, 465 U.S. at 689. It would be unjust to allow the mere filing of a lawsuit by plaintiffs to be the predicate upon which a claim of unconstitutionality is founded.

THE "HISTORY AND UBIQUITY" OF RELIGIOUS INVOCATIONS AND BENEDICTIONS IN AMERICAN PUBLIC CEREMONY, INCLUDING GRADUATION CEREMONIES, SUPPORTS THEIR INCLUSION UNDER THE FACTS OF THIS CASE.

In her concurrence in *County of Allegheny*, Justice O'Connor noted that the "history and ubiquity" of a practice is a significant factor in determining the primary effect of a challenged tradition because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *Id.*, 492 U.S. at 630, (O'Connor, J. concurring in part and concurring in the judgment), citing *Lynch*, 465 U.S. at 693, (O'Connor, J. concurring). Of course, "no one acquires a vested or protected right in violation of the Constitution by long use," *Walz v. Tax Commission*, 397 U.S. 664, 678 (1970), but such long use does indicate that "such government acknowledgments of religion are not understood as conveying an endorsement of particular religious beliefs." *County of Allegheny*, 492 U.S. at 625 (O'Connor, J. concurring in part and concurring the judgment).

Historical context is not only a consideration in the endorsement analysis; it provides direct evidence of the intentions of the Framers of the First Amendment. As Justice Oliver Wendell Holmes, Jr. observed, "a page of history is worth a volume of logic." *New York Trust Comp. v. Eisner*, 256 U.S. 345, 349 (1921). Examination of history also addresses the concern that cases implicating cherished First Amendment religious freedoms not be decided in such a way as to "undermine the ultimate constitutional objective as illuminated by history." *Walz*, 397 U.S. at 671. Historical research establishes that public prayers at civil ceremonies have been a fixture of America's life and heritage since the Nation's inception and are not the type of activity which the Framers intended the Establishment Clause to forbid.

A. PUBLIC INVOCATIONS AND PRAYERS HAVE BEEN A FIXTURE OF AMERICAN CIVIL LIFE AND CEREMONY SINCE THE INCEPTION OF THE NATION. THE FRAMERS OF THE ESTABLISHMENT CLAUSE ACTIVELY PARTICIPATED IN PUBLIC INVOCATIONS AND PRAYERS.

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the United States Supreme Court stated:

[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress - their actions reveal their intent.

Id. at 790. Historical evidence clearly establishes that the Framers of the First Amendment never intended the Establishment Clause to forbid public invocations or prayers at civil ceremonies.

The Declaration of Independence, the founding document of the nation, begins with an appeal to "the Laws of Nature and of Nature's God." Its benediction proclaims a "firm reliance on the Protection of Divine Providence." That seminal document contains a prayer "to the Supreme Judge of the world for the rectitude of our intentions." The fate of the Republic from the start was linked to a public petition to God by the unanimous agreement of the Signers. This appeal transcended their religious differences, gaining the approval of Deist and Christian supplicant alike. The religious language in the Declaration was not simply a meaningless gesture.

In his concurrence with the First Circuit Court of Appeals, Judge Bownes takes *Amicus* National Legal

Foundation to task for advancing this view of the Declaration: "*Amicus Curie* National Legal Foundation would have us read the religious imagery of the Declaration into the Constitution. There is not justification for such a reading. The omission of a reference to a Deity in the Constitution was not inadvertent; nor did it remain unnoticed." *Weisman*, 908 F.2d at 1091, n. 5.

John Quincy Adams took a very different view. In his "*Discourse on the Jubilee of the Constitution*" delivered on April 30, 1839, Adams spoke at considerable length on the theme that the Constitution was part and parcel of Declaration. He described the Constitution as "the complement to the Declaration of Independence; founded upon the same principles, carrying them out into practical execution, and forming with it, one entire system of national government." J. Q. Adams, *The Jubilee of the Constitution: A Discourse Delivered at the Request of The New York Historical Society*, The New York Historical Society, 4 (1839). Those principles, according to Adams, were based on "the laws of nature and of nature's God,

and of course presupposes the existence of a God, the moral ruler the universe..." *Id.* at 5. This connection between the Declaration and the Constitution has also been recognized in U.S. government publications. A pamphlet produced by the Division of Publications of the National Park Service under the Department of the Interior quotes John Quincy Adams on this very point. The pamphlet, entitled *The Framing of the Federal Constitution*, states: "To many of the Founding Fathers the Federal Constitution was the culmination of the great events inaugurated by the American Revolution. As John Quincy Adams observed years later: 'The Declaration of Independence and the Constitution of the United States are parts of one consistent whole, founded upon the same theory of government.'" Richard Morris, *The Framing of the Federal Constitution*, 20 (1986).

Congress has a permanent record of opening with prayer. Congress is at once our most public and influential institution. The second day the Continental Congress met, September 6, 1774, Mr. Cushing of Massachusetts moved the proceedings be opened with prayer. Samuel Adams spoke in support of the motion,

saying he was "no bigot." Adams stated, he could "hear a prayer from a man of piety and virtue, who is at the same time a friend of his country." J. Adams, 1 *Letters of John Adams* 23 (C. Adams, ed. 1841). The religious differences thus overcome, the Rev. Jacob Duche, an Episcopalian, was called upon to lead the prayers. John Adams explained the scene:

You must remember, this was the next morning after we heard the horrible rumor of the cannonade of Boston. I never saw a greater effect on an audience.... Mr. Duche struck out into an extemporary prayer, with such fervor, such ardor, such earnestness and pathos, and in language so elegant and sublime, for America, for the Congress, for the province of Massachusetts Bay, and especially the town of Boston.

Id. p. 24.³

Duche served as Chaplain for three years. On occasion, Congress met at his church "to attend divine service." E. Humphrey, *Nationalism and Religion* 412 (1965), quoting, 2 *Journals of Congress* 81, 87, 192. As

³James Hosmer, biographer of Samuel Adams, notes that this invocation was not divisive, despite the widely scattered religious opinions of the members present, but rather united the body "and a spirit of harmony, quite new and beyond measure salutary, came to prevail." J. Hosmer, *Samuel Adams*, 284-85 (1898).

chaplain in 1776, Rev. Duche led Congress in the following prayer:

O Lord, our heavenly Father...look down in mercy, we beseech thee, on these our American States, who have fled to thee from the rod of the oppressor, and thrown themselves on thy gracious protection, desiring to be henceforth dependent only on thee. To thee do they now look up for that countenance and support which thou alone canst give: take them, therefore, heavenly Father, under thy nurturing care; give them wisdom in council, and valor in the field; defeat the malicious designs of our cruel adversaries; convince them of the unrighteousness of their cause, and if they still persist in their sanguinary purposes, oh! let the voice of thine own unerring justice, sounding in their hearts, constrain them to drop the weapons of war from their unnerved hands in the day of battle.

L. Sabine, 1 *Biographical Sketches of Loyalists of the American Revolution* 389 (reprint ed. 1979)

The situation was no different after the adoption of the Constitution. In *Marsh*, the Court noted that just three days after the First Congress under the Constitution authorized appointment of paid chaplains to open sessions of Congress with prayers, the same Congress reached final agreement on the language of the First Amendment. *Marsh*, 463 U.S. at 788. The Framers of the

First Amendment saw no conflict between the proscriptions of that Amendment and the daily observance of prayer at the very seat of government.

This understanding was not limited to the legislative branch. George Washington, upon the occasion of his first inauguration, took opportunity to acknowledge America's religious heritage. Standing on the second-floor balcony of Federal Hall, then the seat of the United States government, he stated:

[I]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government.... In tendering this homage to the Great Author of every public and private good, I assure myself that it expresses your sentiments not less than my own.... No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States. Every step by which they have advanced to the character of an independent nation seems to have been distinguished by some token of providential agency....

G. Washington, *First Inaugural Address*, in 1 *Messages and Papers of the Presidents* 44 (J. Richardson ed. 1897).

Responding to President Washington's address, the Senate stated:

[W]e are with you unavoidably led to acknowledge and adore the Great Arbiter of the Universe, by whom empires rise and fall. A review of the many signal instances of divine interposition in favor of this country claims our most pious gratitude....

Address of the Senate to George Washington, President of the United States, May 7, 1789, in 1 *Messages and Papers*, supra, at 46-7.

The Senators closed their address by commending President Washington "to the protection of Almighty God..." *Id.* at 47.

It was the First Congress which urged President Washington;

to recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness;

G. Washington: *A National Thanksgiving*, in *Messages and Papers*, 1:56.

As the Supreme Court has noted, this resolution was passed on the same day that final agreement was reached on the language of the Bill of Rights, including the First Amendment. *Marsh*, 463 U.S. at 788 n.9; *Lynch v. Donnelly*, 465 U.S. at 675 n.2 (1984). President Washington set aside November 26, 1789:

to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war...for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed...

And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions; to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed....

Messages and Papers, 1:56

This tradition, carried out by our presidents and fixed by the official Thanksgiving holiday, is the clearest example of the Framers of the Establishment Clause actively participating in public invocations and prayers. The United States Supreme Court has emphasized that the Congress which drafted the First Amendment, "was a Congress whose constitutional decisions have always been regarded, as of the greatest weight in the interpretation of that fundamental instrument." *Myers v. United States*, 272 U.S. 52, 174-5 (1926), cited in *Lynch*, 465 U.S. at, 674. Clearly, Congress saw no conflict between public invocations and prayers and the First Amendment.

Use of public invocations and prayers is by no means limited to Congressional prayer, inaugural addresses, and Thanksgiving proclamations. Each morning, the Federal and State Courts across the nation open with time-honored petitions such as "God save the United States and this honorable Court," which is used in the United States Supreme Court. Every foreign individual who seeks to become a United States citizen concludes his oath of allegiance with the benediction "so

help me God." Oath of Allegiance, 8 C.F.R. 337.1 (1989).

These practices continue unabated by any charge of "establishment of religion."

B. PUBLIC SCHOOLING IN AMERICA HAS ITS ROOTS IN RELIGION. CEREMONIAL PRAYER HAS BEEN A CONSISTENT FEATURE OF AMERICAN EDUCATION.

The religious roots of public education in America date back to the founding of the colonies.

Because of the religious persuasions of the colonists and their predominantly Protestant beliefs, schools were established from the beginning, the first being required in an Act of 1642.

James Bowen, 3 *A History of Western Education* 268 (1981).

In 1647 the Massachusetts Bay colony adopted the famous "Old Deluder Satan Act" establishing public schools and requiring towns to appoint and pay teachers. The primary object of the Act was to teach literacy so citizens would know the Scriptures. *Id.* at 268. The *New England Primer* followed suit with such didactic rhymes as:

A. In Adam's fall,
We sinned all.

B. Thy life to mend
This Book [*i.e.* Bible] attend.

Id., p. 270.

The American Revolution clearly did not extirpate the religious content of these materials. Catechisms such as "Spiritual Milk for American Babes," continued to be employed in public schools well into the 19th century. *Id.*, p. 271. Educational historian R. Freeman Butts, chronicles the development of public schools in the New England, Middle, and Southern colonies. R. Butts, *A History of Education in American Culture* (1953) at 100-108. See also DuPuy, *Religion, Graduation, and the First Amendment: A Threat or a Shadow?* 35 Drake L. Rev. 323, 358-364 (1985-86). Specifically mentioned by Butts are the Massachusetts Acts mentioned above and the Pennsylvania state constitution of 1776 which stated:

A school or schools shall be established in every county by the legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct youth at low prices; and all useful learning shall be duly encouraged and promoted in one or more universities.

Butts, *History of Education*, at 108. Public schools have been a fact of the American scene from the beginning.⁴

Clearly, public education existed contemporaneous with the drafting of the First Amendment just as the use of legislative chaplains upheld in *Marsh*. While the Founding Fathers did not specifically make provision for graduation invocations, as they did for legislative prayers, it was not because public schools did not exist, but because authority over education was reserved to the states. As noted by the court below, "There is no factual basis for an historical argument that the first amendment was intended by the drafters to isolate religion from education." *Weisman* 728 F.Supp. at 73, n.8.

In the federally administered territories and the District of Columbia, the First Congress did have authority regarding education. Congress itself recognized the necessary link between religion and education in the famous wording of the Northwest Ordinance of 1787:

⁴The court below is, therefore, correct in noting that "There is no factual basis for an historical argument that the First Amendment was intended by the drafters to isolate religion from education." *Weisman* 728 F.Supp. at 73, n.8. The court is incorrect in its statement that 1840 was the beginning of public education, as is clear by the discussion above. The first public schools were religiously motivated and insured Biblical literacy. That fact made them no less public, however.

Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

This law, adopted before ratification of the First Amendment and reaffirmed by Congress after the First Amendment was adopted, was the foundation of public education in the Old Northwest. Thomas Jefferson, often considered the strictest of separationists, was the first president of the school board in the District of Columbia in which the Bible and the Watts Hymnal were used as the primary texts. J. Wilson, *Public Schools of Washington*, 1 Records of the Columbia Historical Society 4 (1897).

That the Founding Fathers passed no law requiring graduation invocations shows their respect for federalism. That the First Congress, First Court, and First Executive engaged in invocations and saw no conflict between religion and education is ample proof that our Founding Fathers saw no inconsistency between the practice of invocations in public ceremonies and the Constitution which framed our government.

The long standing practice of invocations and benedictions in the educational context is illustrated by the practice of the University of Georgia, the first public university, chartered by the legislature of that state by an Act of 1785.

"[A] free government...can only be happy where the public principles and opinions are properly directed and their manners regulated. This is an influence beyond the sketch of laws and punishments, and can be claimed only by religion and education. It should therefore be among the first objects of those who wish well to the national prosperity, to encourage and support the principles of religion and morality...that by instruction they should be moulded to the love of virtue and good order."

A Digest of the Laws of the State of Georgia 299 (R. Watkins & G. Watkins eds., 1800 & photo reprint 1981).

Studies began in 1801 and the first graduation ceremony took place May 31, 1804. The commencement "Programme" included a "sacred music" prelude, an invocation by the "Rev. Mr. Marshall" and a "concluding prayer, by Rev. Hope Hull." A.L. Hull, *A Historical Sketch of the University of Georgia*, 17-19 (1894); *Augusta [Ga] Chronicle*, June 23, 1804. Georgia historian E. Merton Coulter adds, "there was always a great flood of

declamations, and, of course, the commencement sermon." E. Coulter, *College Life in the Old South*, 135 (1951). This tradition, at least with respect to the invocation, has continued unabated, the 1988 invocation being the prayer "For Our Country" from the *Book of Common Prayer*, 820 (1789, reprint ed. 1979) delivered by a local pastor.⁵

Those who framed the First Amendment to secure religious liberty actively participated in invocations and benedictions in the context of civil ceremonies. Graduation ceremonies since the founding of the nation have opened and closed with religious invocations and benedictions. If utilized in the "endorsement" analysis

⁵The University of Georgia example is used to show the longevity of the practice in American education graduation ceremonies. Of course, graduation ceremonies predate the founding of the country and have their roots in religious clerical processions. K. Sheard, *Academic Heraldry in America* 69 (1962).

The program employed by the university is relevant in that it is typical of the format used in the Providence schools, except for the sermon. The only difference is the age of the students, yet courts have specifically acknowledged the ability of high school students to distinguish improper sponsorship of religion and neutral acknowledgment or accommodation of religion. *Mergens v. Board of Education of Westside Community Schools*, 110 S.Ct. 2356, 2372 (1990); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 556 (Powell, J., dissenting) (few years of difference in age between high schoolers and college age students irrelevant); *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969), and the discussion in Part I Section C, p. 22 above.

presently employed by the United States Supreme Court, the "history and ubiquity" of graduation prayers, as part of the context in which the practice must be evaluated, clearly supports a finding of no unconstitutional establishment of religion. If viewed as an independent assessment of the meaning and scope of the First Amendment, it is clear that invocations at civil ceremonies, including graduations, was not the type of activity the First Amendment was designed to prohibit. Any other interpretation "sweeps away the practices of the Framers themselves [and] is implausible as well as inappropriate. We should not treat them [the Framers] as hypocrites about their own handiwork." *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 140 (7th Cir. 1987) (Easterbrook, J., dissenting).

IV CONCLUSION

Whether viewed under the "endorsement" test employed by the current United States Supreme Court, or the practice of the Framers of the First Amendment as revealed in history, the inclusion of an invocation and

benediction in a public high school graduation ceremony is a constitutional practice. It is no different from "Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths - these and all other references to the Almighty that run through our laws, *our public rituals, our ceremonies...*" which have never been held as "flouting the First Amendment." *Zorach v. Clauson*, 343 U.S. 306, 312-313 (1952) (emphasis added). Certainly where, as here, the prayers at issue do not:

A. take place in the pedagogical environment of the classroom or

B. coerce any religious exercise or belief, they must be presumed to pass muster under the Establishment Clause.

This Court should emphatically reject the simplistic *per se* approach to religion in public ceremony advocated by plaintiffs and utilized by the court below. Such censorship of religious speech from public life does not constitute neutrality toward religion, *but hostility of the worst sort*. It relegates religion to a second class status in the political

community. As Justice Goldberg warned in his concurring opinion in *Abington v. Schempp*:

It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

Abington, 374 U.S. at 306 (Goldberg, J. concurring).

The present policy of the Providence public schools regarding graduation invocations and benedictions has no ulterior purpose or impermissible effect that render it unconstitutional. Rather, the policy recognizes, in the words of writer and social critic Richard John Neuhaus, that:

[O]ur public life should reflect the vibrant pluralism that is America. That pluralism includes religion and religious symbols in public....A public square that is stripped of all signs of our differences may offend nobody, but it will also be a public square in which nobody feels at home. A naked public square or a homogenized public square is a profoundly undemocratic public square.

R. Neuhaus, *Religion in Public Places*, Washington Times, May 2, 1986, at 3D.

Roger Williams, the founder of Rhode Island and a student of Sir Edward Coke, was the prime mover in that state's historic commitment to religious freedom. The late Harvard law professor Mark Dewolfe Howe in his book, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (University of Chicago Press 1965), used Roger Williams' church/state metaphor in the title of his book. He quotes Williams on the book's title page:

When they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made His garden a wilderness, as at this day.

Howe goes on to explain that it was Williams' metaphor of separation that was the prevailing view of church/state relations at the time of the drafting of the First Amendment:

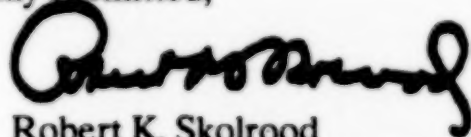
Seen in this context of theory, the First Amendment's religious clauses seem as consistent with the attitude toward religion reflected in the figure of speech used by Roger Williams as with that discovered by the Court in the same figure when it came from the pen of Thomas Jefferson... I think

it likely that the amendment's prohibitions at the time of their promulgation were generally understood to be more the expression of Roger Williams' philosophy than that of Jefferson's. This heterodox supposition I base upon my belief that, by and large, American opinion in 1790 accepted the view that religious truth is identifiable and beneficent. It was, in large part, because that was the prevailing view that it seemed peculiarly appropriate to safeguard that truth from the rough and corrupting hand of government. I take it, in other words, that the predominant concern at the time when the First Amendment was adopted was not the Jeffersonian fear that if it were not enacted the federal government would aid religion and thus advance the interest of impious clerks but rather the evangelical hope that private conscience and autonomous churches, working together and in freedom, would extend the rule of truth.

Id. at 18, 19.

Nothing in the history or jurisprudence of this nation suggests that public ceremonies should be sanitized of all religion or references to a deity. The court below should be REVERSED.

Respectfully submitted,



Robert K. Skolrood
Attorney for Amicus Curiae

MAY 24 1991

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1990

ROBERT E. LEE, INDIVIDUALLY AND AS PRINCIPAL
OF NATHAN BISHOP MIDDLE SCHOOL, ET AL.,

Petitioners,

v.

DANIEL WEISMAN, ETC.,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The First Circuit

BRIEF AMICUS CURIAE OF THE CHRISTIAN LEGAL
SOCIETY, NATIONAL ASSOCIATION OF
EVANGELICALS, AND THE FELLOWSHIP
OF LEGISLATIVE CHAPLAINS, INC.
IN SUPPORT OF PETITIONERS

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**BRIEF AMICUS CURIAE OF THE CHRISTIAN
LEGAL SOCIETY, NATIONAL ASSOCIATION OF
EVANGELICALS, AND THE FELLOWSHIP OF
LEGISLATIVE CHAPLAINS, INC. IN
SUPPORT OF PETITIONERS**

INTERESTS OF AMICI

The Christian Legal Society is a nonprofit professional association, founded in 1961, with a present membership of 3,500 Christian judges, attorneys, law professors and law students. Concerned about Constitutional rights, it founded the Center for Law and Religious Freedom in 1975 to protect and promote the freedoms guaranteed by the First Amendment through advocacy and education. The Center has been active in public education law issues, including equal access, religious time, curriculum and values, and freedom of speech. It has supported individual religious speech rights in public places, while opposing government-composed classroom prayers.

The National Association of Evangelicals is a nonprofit association of evangelical Christian organizations, colleges and universities, as well as some 50,000 churches from 74 denominations. It serves a constituency of approximately fifteen million people.

The Fellowship of Legislative Chaplains, Inc. is a tax exempt nonprofit association of chaplains serving the Congress and state legislatures nationwide.

The letters from the parties consenting to the filing of this brief have been filed with the Clerk pursuant to Rule 36.2.

SUMMARY OF ARGUMENT

This case challenges a public middle school commencement invocation and benediction by a guest speaker, Rabbi Leslie Gutterman, as violative of the Establishment Clause. Federal and state courts are now divided on the question. The lower courts in the present case have ruled against the practice. A divided panel of the Court of Appeals accepted the opinion of the district court, Pet. App. 18a-30a, in a cursory one-paragraph opinion. Pet. App. 2a. In the view of the amici, the opinion of the district court failed to consider general principles governing freedom of expression, and it overlooked several important distinctions between this case and prior rulings of this Court on prayer in public schools that render the practice at issue here constitutionally benign.

1. The prior restraint imposed on religious speech at the commencement exercise constitutes discriminatory content-based regulation of speech, which may not be censored merely because some hearers find it offensive. The judicial imposition of a prior restraint on religious speech must meet the same heavy burden of justification for this stark remedy that is required before other forms of speech may be banned.

2. The content-based regulation of the religious message of a private actor at an annual commencement ceremony is not required by the previous School Prayer decisions of this Court. The prayer prohibited by the Court of Appeals was not composed by the government, but by a rabbi acting authentically within his own religious tradition, and with sensitivity for the religious diversity of the audience. The prayer was not spoken by a governmental employee, but by a private actor invited as

a guest of the graduates to add a note of solemnity to an annual event.

The danger that students who are members of a minority religious faith or nonbelievers would be influenced to modify or abandon their belief or unbelief by the prayer offered by the rabbi in this case is diminished by the presence of their parents, family and friends, all voluntarily present at the commencement ceremony.

3. The criteria announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as modified by subsequent decisions, are not violated by a guest speaker's reference to the Deity at a prayer delivered at an annual commencement exercise. The requirement of a secular purpose is not violated when the government allows a guest speaker at a commencement ceremony to invoke the name of God in a benediction for reasons that are arguably secular, or for mixed secular and religious purposes. The principal or primary effect of inviting a guest speaker to offer a prayer at a commencement ceremony has not been to advance any particular religion, or religion in general. Inviting a private actor to speak freely and without prior censorship avoids governmental involvement in classifying religious practices and governmental monitoring of religious ministries. The political divisiveness standard has been relied upon only rarely, is at odds with the history and purpose of the First Amendment, and should be formally abandoned.

4. One of the principal historical purposes of both the Establishment Clause and the Free Exercise Clause was to avoid governmental coercion of faith or conduct at odds with religious conscience. The Court should reaffirm this insight in this case and use the earliest possible opportunity to correct the egregious error it committed

last Term in diminishing judicial protection of free exercise of religion to a virtual nullity in *Employment Division v. Smith*, 494 U.S. ___, 110 S.Ct. 1595 (1990).

ARGUMENT

I. PUBLIC SCHOOL OFFICIALS MAY ALLOW GUEST SPEAKERS TO ENGAGE IN RELIGIOUS EXPRESSION FREELY AT A GRADUATION CEREMONY.

A. Prohibition of the religious component of a message delivered by an invited guest at a public event constitutes discriminatory content-based regulation of speech.

The district court could not have made it clearer that the task it undertook was to regulate speech on the basis of its content. It made explicit the role of censorship it was performing by *rewriting* the benediction that Rabbi Gutterman "could have delivered," excising the reference to God as prohibited speech, but allowing the rest of the rabbi's well-chosen, inspirational words as permissible speech. Pet. App. 28a, n. 10.

This Court has repeatedly taught that the government may not discriminate in regulation of speech on the basis of the content of the message. See, e.g., *Police Dep't. of Chicago v. Mosley*, 408 U.S. 92 (1972). In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court expressly extended this teaching to include religious speech, ruling that when the Government establishes a limited public forum, it may not exclude speakers from that forum simply because of the religious content of their message. It did so both because content-based regulation of speech violates familiar free speech principles, *id.*, 454 U.S. at 270, and

because this kind of discriminatory regulation is not required by the Establishment Clause, *id.*, 454 U.S. at 277-78. That teaching was confirmed in federal legislation securing the access by religious speakers on an equal basis to that enjoyed by other speakers in extracurricular activities in public secondary schools; and this Court sustained that legislation in *Bd. of Educ. of Westside Community Schools v. Mergens*, 495 U.S. ___, 110 S.Ct. 2356 (1990). Although the principles announced by this Court in *Widmar* and *Mergens* have application to the extracurricular activity of the commencement exercise at issue here, those precedents were ignored by the courts below.¹

Telling a commencement speaker that his or her speech must be banned because it contains a religious reference is a prior restraint of the worst kind. It is not disputed on this record that the school may invite a member of the clergy to provide an invocation or benediction.² The only dispute is whether the clergy may make reference to the deity in their words or whether clergy is constitutionally obliged to leave unstated the one addressed in the invocation ("To whom it may

¹ The only reference to either precedent is in Judge Bownes's concurring opinion in the Court of Appeals. Pet. App. 8a.

² At a hearing in the district court Judge Boyle asked counsel for the plaintiff: "Do you agree with the amicus brief that says inspirational secular speech is all right?" Counsel replied: "Yes. . . . What we are objecting to is the School Department's allowance of a prayer to a higher being." T. at 8. Judge Boyle later noted in his opinion that "[t]he plaintiff here is contesting only an invocation or benediction which invokes a deity or praise of a God." Pet. App. 28a.

concern") or the source of the blessings in the benediction ("O God, if you are, help us if you can").

Amici submit that the Free Speech Clause does not mandate the censorship of inspirational remarks to some lowest common denominator of a Hallmark card variety. As Justice Brennan put it, "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

For the reasons set forth below, a school may allow a guest speaker at an annual commencement exercise to make ceremonial reference to or invoke the Deity and still achieve government neutrality as between religion or no religion, provided that the forum is made available on a nonpreferential basis and without governmental endorsement of the message of the speaker.

B. Religious speech may not be censored merely because some hearers find it offensive.

Respondent misperceives the limited role of government in regulating public speech. The government may not censor an invited guest at a public event merely because a word, otherwise protected, might offend someone. The narrowly focused objection of the respondent is to the word "God" heard by apparently unwelcoming ears. To the extent that respondent's constitutional claim rests on this sort of offense alone, it borders on the frivolous, for this Court has taught repeatedly that speech may not be censored merely because some hearers find it offensive. See, e.g., *Texas v. Johnson* 491 U.S. 397, 407 (1989).

The question of whether religious speech is "otherwise protected" should not, however, be begged either by the petitioner or the respondent. Our view is that intolerant exclusion of religious discourse from public expression violates the very spirit of the most central traditions about liberty that marks America as a free nation. Nothing, in fact, could be more offensive to the First and Fourteenth Amendments than to rule speech out of bounds because it might be "offensive" to some. To quote Justice Brennan again, "religious ideas, no less than any other, may be the subject of debate which is 'uninhibited, robust, and wide-open.'" *McDaniel, supra*, 435 U.S. at 640 (Brennan, J., concurring). Religious expression enjoys the same high protection as nonreligious speech. See *Widmar, supra*, 454 U.S. at 270. Just as the Equal Access Act granted "equal access to both secular and religious speech," so the commencement forum provided by the school here allows private speakers the opportunity to engage voluntarily in speech of their choice, whether religious or nonreligious in form or content. See *Mergens, supra*, 110 S. Ct. at 2371.

We thus conclude that censorship of the religious speech of an invited guest at a voluntary, ceremonial, public, and civic event merely because someone may take offense at its religious content violates the central commitment of the Free Speech Clause to the proposition that speech is cured by more speech, not less. See, e.g., *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence"). It sends the discriminatory message that nonreligious speech enjoys a higher constitutional

protection than religious speech. Hence respondent may not use the Establishment Clause as a weapon to silence a legitimately invited guest engaging in otherwise protected speech. See sections II and III, below.

The Williamsburg Charter, a bicentennial document celebrating the Religion Clause, urges Americans to adopt a more open attitude about the legitimate role of religion in public life. The document suggests that the view that "the American people's historically vital religious traditions were at best a purely private matter and at worst essentially sectarian and divisive . . . betrays a failure of civil respect for the conviction of others." *Williamsburg Charter*, 8 J. L. & Relig. 5, 12 (1990). The very pluralistic character that some rely upon to exclude any form of religious speech in the public forum – even at a public, voluntary, civic and ceremonial event of the sort at issue here – may also be invoked as the reason for greater toleration, not greater repression and censorship. In the words of the Williamsburg Charter:

One of the ironies of democratic life is that freedom of conscience is jeopardized by false tolerance as well as by outright intolerance. Genuine tolerance considers contrary views fairly and judges them on merit. Debased tolerance so refrains from making any judgment that it refuses to listen at all. Genuine tolerance honestly weighs honest differences and promotes both impartiality and pluralism. Debased tolerance results in indifference to the differences that vitalize a pluralistic democracy. *Id.*, 8 J. L. & Relig. at 19.

Governmental neutrality among faiths honors the pluralistic character of this country, but the principle of neutrality does not countenance government indifference

or hostility to religion, nor require its censorship in voluntary public fora. See Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 De Paul L. Rev. 993 (1990).

C. The judicial imposition of a prior restraint on religious speech must meet the same heavy burden of justification for this stark remedy that is required before other forms of speech may be banned.

This Court has also taught that one who seeks to impose a prior restraint on speech bears a heavy burden of justification for this stark remedy. See, e.g., *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). When the judiciary is the source of the power issuing the prior restraint, the burden of justification is all the more heavy, not less so, because of the judicial oath to support the Constitution. See, e.g., *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539 (1976) ("gag order" may not be sustained against the press even to protect the constitutional value of a fair trial before an impartial jury). These precedents were overlooked in the opinions below.

In this case, the judiciary issued a partial "gag order" on future guest speakers at commencement exercises, requiring them to keep silence about their religious convictions relating to the graduates. The putative justification for this "gag order" is the requirement the government refrain from establishing a religion. That constitutional duty is no less significant than the duty to proceed fairly against those accused of crime, which was not sufficient by itself in *Nebraska Press Ass'n.* to overcome the high presumption against prior restraints. This does not mean that a prior restraint against religious speech could never be required under the Establishment

Clause. Both *Engel v. Vitale*, 370 U.S. 421 (1962) and *Abington Township School Dist. v. Schempp*, 374 U.S. 203 (1963) hold to the contrary. But it does mean that – in order to satisfy the requirements of the Free Speech Clause – more careful analysis of the potential Establishment Clause violation is required than was undertaken here. See Sections II and III, below.

II. Content-based Regulation of Religious Speech by a Private Actor at an Annual Graduation Ceremony is Not Required by the Previous School Prayer Decisions of this Court.

A. The prayer prohibited by the Court of Appeals was not composed by the government, but by a rabbi acting authentically within his own religious tradition, and with sensitivity for the religious diversity of the audience.

This Court has taught that prayer composed by the government violates the Establishment Clause. In contrast to the “Regent’s Prayer” invalidated in *Engel, supra*, the prayer offered on the occasion of the commencement exercise at issue here was composed by a rabbi acting authentically within his own religious tradition and with sensitivity for the reality that those who would hear the prayer were of many differing religious backgrounds.³

³ The prayers offered by Rabbi Gutterman are included in the opinion of the district court. Pet. App. 20a, notes 2 & 3. A pamphlet prepared by the National Conference of Christians and Jews, entitled “Guidelines for Civic Occasions,” was available to the rabbi. The guidelines suggest methods of composing “public prayer in a pluralistic society,” stressing “inclusiveness and sensitivity” in the structuring of non-sectarian prayer. Pet. App. 19a.

B. The prayer prohibited by the Court of Appeals was not spoken by a governmental employee, but by a private actor invited as a guest of the graduates to add a note of solemnity to an annual event.

As the Court has taught in *Schempp, supra*, a governmental employee must refrain from devotional recitation of the Lord’s Prayer or the reading of the Bible as devotional literature. In contrast with the practice invalidated in *Schempp*, the prayer offered here was not spoken by a governmental employee, but by a private actor invited as a guest of the graduates to add a note of solemnity to an annual event.

It is constitutionally significant to distinguish between government speech that advocates a religiously partisan message to school children on a daily basis in a classroom and a private speaker who invokes a deity at annual commencement exercises. Although teachers may not promote sectarian tenets in public school classrooms, students are free to communicate with other students in appropriate times and settings about religious subjects, to pray, or to otherwise refer to ultimate concerns. The critical distinction concerning the status of the speaker in the public school setting has been definitively expounded by this Court. As the Court said recently in *Mergens*, “there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion which the Free Speech and Free Exercise Clauses protect.” 110 S. Ct. at 2372 (emphasis in original). See Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 11 (1986) (“That the government cannot express religious opinions does not

mean that it can censor religious expression by private speakers.").

The context within which the "offending" eight words were spoken by Rabbi Gutterman is also crucial. The setting was a middle school commencement *ceremony*. Public school commencement exercises have provided a traditional and time-honored civic and inspirational moment when students, accompanied by parents, family, friends and honored guests, are asked to celebrate their academic achievement and accept the common responsibility to carry on the important values and virtues necessary to a democratic and free society. The completion of an educational milestone marked by a commencement ceremony takes the form of a public moment, inherently different from other instructional and curricular events. There are several important distinctions between the way public education traditionally provides closure to and public recognition of academic achievement and the way it conducts its educational mission in the classroom.

The following attributes of these kinds of ceremonies support the conclusion that the invocation and benediction offered here was wholly protected by the First Amendment Speech Clause and does not offend the Establishment Clause.

1. Participation in a commencement is typically *voluntary*.⁴ Students are invited, not compelled, to receive

⁴ Respondents and their amici may argue that the voluntary character of such participation in prayer would be heightened by confining all religious speech to a separate

(Continued on following page)

their diplomas and to receive public recognition for their academic achievement.

2. Commencement is a *ceremonial* event. It is not a required part of the curriculum, but an extracurricular rite of passage, marking the completion of studies and honoring academic achievement. Ceremony and ritual add dignity and importance to the event. It should come as no surprise, then, that the participants in the event should plan to include *ceremonial* speech, including an address by a visiting dignitary and – as here – an invocation and a benediction with reference to the Deity. Speech of this nature serves the legitimate purpose of enhancing the solemnity, dignity, and decorum of an important civic ceremony.

3. A commencement is a *public* event attended by elected local officials, school board members, community leaders, invited guests, teachers, administrators, staff, students, their parents, family and friends. The public nature of the proceedings and the presence of parents act as a buffer against religious coercion. *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1409-10 (6th Cir. 1987).

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baccalaureate service. Although true, this observation is irrelevant to the disposition of this case, for the First Amendment does not require that speech be censored or confined to another forum merely because it is offensive, but only when there is present some principle that might serve to limit speech, such as nonestablishment of religion, *Engel, supra*, and *Schempp, supra*, or the probability of imminent public danger, *Brandenburg v. Ohio*, 395 U.S. 444 (1969). A violation of the nonestablishment principle, moreover, may not be assumed simply because of the religious content of speech. See *Widmar, supra*, and *Mergens, supra*.

4. A commencement is a *civic* event. The government provides a forum in which inspirational addresses, invocations and benedictions concern common responsibilities and allegiances. The event evokes the recalling of history, the quoting of famous persons, and the reciting of poetry. It invokes Divine Providence to provide the blessings of liberty. At its best, it embraces persons of all races, colors and creeds. It is a civic event where Americans meet, where their differences count, where their rights are respected.⁵ The civic character of the event demonstrates the pluralistic character of the nation by inclusion, not exclusion, of different viewpoints that are necessarily present when invited guests provide their own commentary on subjects appropriate to the public occasion.

- C. **The danger that students who are members of a minority religious faith or nonbelievers would be influenced to modify or abandon their belief or unbelief by the prayer offered by the rabbi in this case is diminished by the presence of their parents, family and friends, all voluntarily present at the commencement ceremony.**

This Court noted in *Schempp, supra*, that in a classroom setting where the concern about a "captive

⁵ For example, the flag might be presented as a symbol of national unity and saluted in the Pledge of Allegiance, with its description of ourselves as "one nation under God." After *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), this does not mean that Jehovah's Witnesses could be required to join in this part of the ceremony. By the same token, respect for the conscience of Jehovah's Witnesses does not mean that this part of the ceremony must be eliminated from the program. Analogously, some may disagree with the religious sentiments articulated by a guest speaker, but that does not entitle them to censor the speaker.

audience" of young, impressionable children, there may be a sufficient degree of "subtle coercion" or peer pressure to warrant the protection of the Establishment Clause. In contrast to the compulsory context in *Engel* and *Schempp*, no student was required to be present for the commencement exercise at issue here. The danger that students who are members of a minority religious faith or nonbelievers would be influenced to modify or abandon their belief or unbelief by the prayer offered by the rabbi in this case is diminished by the presence of their parents, family and friends, all voluntarily present at the commencement ceremony. *Stein, supra*, 822 F.2d at 1409-10.

III. THE CRITERIA ANNOUNCED IN *LEMON v. KURTZMAN*, AS MODIFIED BY SUBSEQUENT DECISIONS, ARE NOT VIOLATED BY A GUEST SPEAKER'S REFERENCE TO THE DEITY IN A PRAYER DELIVERED AT AN ANNUAL COMMENCEMENT EXERCISE.

The three-part test in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), has been materially altered by this Court since its promulgation over 20 years ago. Much of the criticism of *Lemon* is based on a literal and often mechanical application of the purpose, effect, and entanglement formulation, rather than on a careful reading of the test as it has evolved in the Court's subsequent decisions. Hence we do not urge that the Court abandon *Lemon* altogether, but that it use this case to clarify the standards governing Establishment Clause cases. See Esbeck, *The Lemon Test: Should It Be Retained, Reformulated or Rejected?* 4 Notre Dame J. of L., Ethics & Pub. Pol. 513 (1990).

- A. The requirement of a secular purpose is not violated when the government allows a guest speaker at a commencement ceremony to invoke the name of God in a benediction for reasons that are arguably secular, or for mixed secular and religious purposes.**

To survive Establishment Clause analysis, a law must have, according to the first of the three requirements laid down in *Lemon*, a "secular legislative purpose." This test has been decisive only in cases involving religion in the public schools. *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Stone v. Graham*, 449 U.S. 39 (1980); *Wallace v. Jaffree*, 472 U.S. 38 (1985); and *Edwards v. Aguillard*, 482 U.S. 578 (1987). In other cases discussing the secular purpose requirement, the Court has clarified that it will invalidate legislation on this ground "only if it is motivated wholly by an impermissible purpose," *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988); see *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984), or only when it can be said that the law's "pre-eminent purpose . . . is plainly religious in nature." *Stone*, *supra*, 449 U.S. at 41; see *Edwards*, *supra*, 482 U.S. at 590. Conversely, the Court has said that "a statute that is motivated in part by a religious purpose" does not violate the purpose prong, *Jaffree*, *supra*, 472 U.S. at 56. Neither is it required that a "law's purpose must be unrelated to religion," for that would require government to "show a callous indifference to religious groups." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987). As reformulated, then, the proper inquiry is whether the sole purpose of the law is to advance religion. When government acts either out of apparent reasons that are arguably secular, or with mixed secular and religious purposes, the first prong of *Lemon* is not violated.

After some confusion, it is now clear that the first prong of *Lemon* involves scrutiny of the objective purpose of the law or practice under examination, not the subjective motive of the legislator or administrator.

Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law.

Mergens, *supra*, 110 S. Ct. at 2371 (1990) (emphasis in original).

This Court has in most cases easily found a permissible purpose of a law in its language, its legislative history, or simply by exercising common sense. As can be expected, current application of the purpose prong will only rarely result in invalidation of a rule or statute. See *Bowen v. Kendrick*, *supra*, 487 U.S. at 634 (Blackmun, J., dissenting). The purpose inquiry should be limited to analysis of the objective purpose of the law as manifested by facial analysis and the official legislative record. *Jaffree*, *supra*, 472 U.S. at 75-76 (O'Connor, J., concurring). "Given the many hazards involved in assessing the subjective intent of governmental decisionmakers," *Edwards*, *supra*, 482 U.S. at 639 (Scalia, J., dissenting), the "question of [the] constitutionality [of legislation] cannot rightly be disposed of on the gallop, by impugning the motives of its supporters." *Id.* at 611. The school's invitation to a guest speaker to give the invocation and benediction satisfies the deferential purpose test. There is a long history and tradition of such community participation in

commencement exercises for legitimate purposes such as adding solemnity and dignity to the event.

B. The principal or primary effect of inviting a guest speaker to offer a prayer at a commencement ceremony has not been to advance any particular religion, or religion in general.

Lemon's second prong required that the "principal or primary effect" of a law or governmental policy "must be one that neither advances nor inhibits religion." Conversely, this Court has sustained the constitutionality of laws that have only an incidental or de minimis effect of advancing religion. *See, e.g., Widmar, supra*. When religion is materially advanced by a law, albeit unintentionally, presumably the effect or impact will be apparent from the day-to-day operation of the law. That is, in a straightforward application of an effect test, a court would inquire whether there is measurable, palpable evidence – not a mere "risk" or "fear" – that a religion (or religion generally) is advanced. *See, e.g., Amos*, 483 U.S. at 337 ("no persuasive evidence in the record" that exemption of religious bodies in Title VII had the effect of strengthening their ability to propagate religious doctrine); *Widmar, supra*, 454 U.S. at 275 ("in the absence of empirical evidence that religious groups will dominate [the university's] open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's 'primary effect.'").

The record here is devoid of evidence that a particular religion, or religion in general, has been on the rise within Nathan Bishop Middle School or in the community of Providence as a result of their long history of commencement invocations and benedictions. Indeed, the

recent pattern in the defendant school district of such public references to the Deity is one of increasing inclusiveness of additional religious groups and tolerance toward dissenters. Short of evidence that the practice in question has spawned incidents of discrimination or the like, mere "feelings" of being offended are not palpable evidence that religion has been advanced contrary to *Lemon's* second prong.⁶

C. The invitation of a guest speaker to offer a prayer at a commencement ceremony avoids governmental entanglement in classifying religious practices and governmental monitoring of religious ministries.

The third prong of *Lemon* required an examination concerning whether the law in question fostered excessive administrative entanglement between the offices of government and religious organizations. The recurring themes of avoiding governmental involvement in classifying religious practices and avoiding the monitoring of religious ministries were brought together in *Widmar, supra*. Although permitting use of buildings and other facilities by student groups, the state university in *Widmar* sought to bar use by student groups that had a

⁶ Amici acknowledge that in some cases involving financial aid to schools and other institutions operated by churches, this Court has not required measurable evidence that the primary effect of the aid has been to advance religion. Rather, because the Court has apparently regarded these institutions to be "pervasively sectarian," the Court has been willing to strike down legislation merely because of the risk that religion might be advanced by the aid. But this case involves a public school, not one operated by a church. Hence the concern about a "pervasively sectarian" institution does not apply here.

religious purpose. On the basis of speech and associational freedoms, this Court upheld the right of student groups with a religious focus to use university facilities on an equal basis with all other student groups. The dissent argued that the Establishment Clause permitted the university to deny use of its facilities for "religious worship," although it was agreed that "religious speech" could not be excluded based on the Court's precedents prohibiting content-based censorship. 454 U.S. at 283-286 (White, J., dissenting). The majority rejected this suggested distinction between "worship" and "religious speech" on entanglement-avoidance grounds. The Court pointed out that the distinction would (1) compel the university "to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith," *id.* at 269-270 n.6, and (2) foster "a continuing need to monitor group meetings to ensure compliance with the rule," *id.* at 272 n. 11.

Applying this standard to this case, amici are of the view that – far from entangling the government in classifying religious practices and in extensive monitoring of religious ministries – the invitation of a guest speaker to offer a prayer at an annual commencement ceremony avoids difficulties of this sort.

D. The political divisiveness standard has been relied upon only rarely, is at odds with the history and purpose of the First Amendment, and should be formally abandoned.

Another standard enunciated in *Lemon* is that political divisiveness along religious lines may constitute an independent ground for nullifying legislation challenged under the Establishment Clause. The Court subsequently

narrowed the application of this standard to cases involving financial assistance to religious schools. *Mueller v. Allen*, 463 U.S. 388 (1983). The author of *Lemon*, Chief Justice Burger, later acknowledged that this standard should not function as an independent ground for nullifying a practice such as that at issue here. *Lynch v. Donnelly*, 465 U.S. 668 (1984). See *Bowen, supra*, 487 U.S. at 617 n. 14; *Amos, supra*, 483 U.S. at 339 n. 17. Despite these clear signals that this test is no longer a valid criterion for an establishment violation, the test resurfaced once in this Court, *Aguilar v. Felton*, 473 U.S. 402 (1985), and continues to have more vitality in the lower courts than it deserves. See e.g., *Cammack v. Waihee*, 59 U.S.L.W. 2689 (9th Cir. April 30, 1991) Amici urge the Court to abandon the political divisiveness test because it is at odds with the history and purpose of the First Amendment. See Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 St. Louis U. L. J. 205 (1980).

The Court's refinement of the *Lemon* test preserves for government its essential neutrality toward religious influence in public settings, without governmental endorsement of religion and without governmental hostility toward religion. It allows religious discourse to compete freely in the marketplace of ideas, which is "neither a naked public square where all religion is excluded, nor a sacred public square with any religion established or semi-established . . . [but] a civil public square in which citizens of all religious faiths, or none, engage one another in the continuing democratic discourse." *Williamsburg Charter, supra*, 8 J. L. & Relig. at 18.

IV. ONE OF THE PRINCIPAL HISTORICAL PURPOSES OF BOTH PROVISIONS OF THE RELIGION CLAUSE WAS TO AVOID GOVERNMENTAL COERCION OF FAITH OR CONDUCT AT ODDS WITH RELIGIOUS CONSCIENCE.

This case affords the Court the opportunity to clarify the general standards governing Establishment Clause jurisprudence. The path of the law deriving from *Lemon* has not been smooth. Members of this Court⁷ and commentators⁸ have pointed out anomalies and difficulties with the fruit of the *Lemon* tree. Although the *Lemon* test – as announced twenty years ago – has proved unworkable as a general statement of constitutional principles, several cases since then have contained helpfully nuanced reformulations of those principles. The Court should use this case as a vehicle to announce with greater clarity the principles governing the interpretation of the Religion Clause, particularly the historically accurate reflection that the object of both the Establishment Clause and the Free Exercise Clause was to avoid governmental coercion of faith or conduct at odds with religious conscience.

⁷ See, e.g., *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 109 S.Ct. 3086, 3134-45 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); *Edwards, supra*, 482 U.S. at 636-40 (Scalia, J., dissenting); *Jaffree, supra*, 472 U.S. at 69-70 (O'Connor, J., concurring); *id.* at 92-115 (Rehnquist, J., dissenting); and *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980).

⁸ See, e.g., Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673 (1980), and Ripple, *The Entanglement Test of the Religion Clauses - A Ten Year Assessment*, 27 U.C.L.A. L. Rev. 1195 (1980).

The petition for certiorari presents the question "whether direct or indirect government coercion is a necessary element of an Establishment Clause violation." Pet. i. The Solicitor General has likewise urged this Court to address the question of coercion. Brief Amicus Curiae of the United States, i. Amici assume that the Petitioner and the United States will address their views on this matter fully in their briefs.

A. The Court should reaffirm that some element of coercion is necessary to create a prima facie violation of the Religion Clause.

Our concerns about reintroducing the coercion element into Establishment Clause jurisprudence are two-fold. On the one hand, greater accuracy about the historical record is preferable to the general state of confusion created by the meandering path the Court has followed on this matter. On the other hand, it would be puzzling if the Court undertook here to reinstate the coercion element in Establishment Clause jurisprudence just after it reduced the coercion element to a virtual nullity in Free Exercise Clause jurisprudence last Term in *Employment Div. v. Smith*. Amici offer three suggestions for getting out of this recently created dilemma: (1) reinstating the Court's earlier teaching that coercion is an element of an Establishment Clause violation; (2) clarifying what is meant by "coercion" of religious conscience in our modern welfare state, and (3) recognizing the complementary purposes of both provisions of the Religion Clause.

First, the Court should acknowledge that, as with other aspects of its teaching on the Religion Clause, the treatment of the coercion theme has not been a model of

consistency. For example, Justice Black wrote in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) that the core meaning of the Establishment Clause is that neither "a state nor the Federal Government . . . can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance." 330 U.S. at 15 (emphasis added). This is manifestly the language of coercion.⁹

Ignoring the clear teaching of history about the coercive nature of an established religion – a matter at the very heart of James Madison's *Memorial and Remonstrance*, cited as an Appendix in *Everson*, *supra*, 330 U.S. at 63-72 – this Court has nonetheless suggested recently that coercion is not present when tax funds are used to advance religious education. *Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (no free exercise claim because plaintiffs were unable to identify any coercion); *Bd. of Educ. v. Allen*, 392 U.S. 236, 248-249 (1968) (same). This case presents the Court with the opportunity to again recognize that coercion is of the essence of what the no-establishment provision forbids.

⁹ The same Justice Black could write in *Engel*, *supra*, 370 U.S. at 430, without so much as a word of explanation or a single precedent in support of the revisionist view that "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion. . . ." Justice Black did, however, acknowledge in *Engel* that "laws officially prescribing a particular form of religious worship . . . involve coercion of such individuals" and that "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain" when "the power, prestige, and financial support of government is placed behind a particular religious belief." *Id.* See McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986).

Second, the Court should clarify what is meant by religious coercion in the contemporary world. One need not suffer the same sort of criminal penalties (including the death penalty) or deprivations of civil liberties (including denial of franchise and office-holding, of property rights, and of rights to marry and to follow a lawful vocation) that were extant in the eighteenth century¹⁰ in order to be found to suffer an unconstitutional restraint on religious freedom in the modern welfare state. In *Sherbert v. Verner*, 374 U.S. 398 (1963), this Court clarified that requiring a choice between receipt of a welfare benefit and fidelity to religious conscience exacts an impermissible penalty on religion. A decade ago the Court reiterated this point in *Thomas v. Review Board*, 450 U.S. 707 (1981):

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. *Id.* at 717-718.

This teaching is not limited to free exercise cases. In *Everson*, *supra*, the Court rejected an Establishment Clause challenge to a governmental subsidy of transportation of children attending religious schools. It did so out of repugnance at the potential denial of a general welfare benefit on the basis of one's religious commitment. 330 U.S. at 16. A careful reading of the record in *Schempp*, *supra*, suggests that although the Court stated in dictum

¹⁰ See, e.g., C. Antieau, A. Downey, and E. Roberts, *Freedom From Federal Establishment* 1-29 (1964).

that coercion would no longer be thought to be an element of an Establishment Clause violation, the Court was actually holding that even subtle forms of coercion – undue governmental *influence* of the religious choice of children compelled to attend school – violate the no-establishment principle. See Section II. C, above.

The standard for the burden triggering relief under either provision of the Religion Clause should be the same: coercion of religious choice.¹¹ After *Employment Div. v. Smith*, however, it is necessary to add that judicial relief from coercion of religious conscience is not an unaffordable “luxury,” but “an essential element of liberty.” 110 S.Ct. at 1616 (Blackmun, J., dissenting).

Third, the Court should use this case as a vehicle for clarifying that the purposes of both the Establishment Clause and the Free Exercise Clause are more in harmony than in tension. In the words of the Williamsburg Charter, the “mutually reinforcing provisions act as a double guarantee of religious liberty.” *Williamsburg Charter, supra*, 8 J. L. & Relig. at 6. As things now stand, some of this

¹¹ Noncoercion may protect nonbelievers as well as believers. Thus, tuition grants from coercively collected tax revenues that are made available only to students at religious schools would interfere with religious choice and thus violate the Establishment Clause. See McConnell, *Coercion: The Lost Element of Establishment, supra*, 27 Wm. & Mary L. Rev. at 940; Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 921 (1986). The Establishment Clause, however, is not violated by governmental funding that advances a neutral governmental interest and is made available on an evenhanded basis to individuals and to institutions that are not “pervasively sectarian.” See *Bowen v. Kendrick*, 487 U.S. 589 (1988), and *Witters v. Washington Dep’t. of Services for the Blind*, 474 U.S. 481 (1986).

Court’s cases have produced widespread confusion about the purposes of these two provisions of the Religion Clause, as though they were at loggerheads with one another.

Each provision of the Religion Clause has a distinct purpose, but those purposes are complementary, not contradictory.¹² But the outcome of a case should not depend on the cleverness of the lawyers in characterizing the claim under one clause or the other.

Under the “tug-of-war” view of the Religion Clause, one provision could virtually nullify the other if both were given full scope. The Court has tried to avoid a reduction of the constitutional text to an absurdity. See, e.g., *Walz v. Tax Comm’n*, 397 U.S. 664, 668-69 (1970). In so doing, the Court has taught about a “tension” between the two provisions, and has elaborated different criteria for adjudication of claims arising under either provision. Thus, before *Smith* the primary distinction between this

¹² Commentators differ in their reading of the purposes of the two provisions of the Religion Clause. Some place the avoidance of official governmental approval and support under the Establishment Clause, and the protection of individual and communal religious faith and conduct under the Free Exercise Clause. See, e.g., Riggs, *Judicial Doublethink and the Establishment Clause: The Fallacy of Establishment by Inhibition*, 18 Valparaiso U. L. Rev. 285 (1984). Others argue that the Establishment Clause was designed to protect church autonomy and individual religious liberty. See, e.g., A. Adams & C. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* 28-31 (1990); and W. Estep, *Revolution Within the Revolution: The First Amendment in Historical Context, 1612-1789, 156-79* (1990).

Court's analysis under the Free Exercise and Establishment Clauses was that a free exercise claim required a showing of coercion but a no-establishment claim did not. See *Tilton, supra*, and *Allen, supra*. This led commentators to note that adopting a coercion test in place of *Lemon* would make the tests for free exercise and no-establishment redundant. See Esbeck, *The Lemon Test, supra*, 4 Notre Dame J. of L., Ethics & Pub. Pol. at 544; Laycock, "Nonpreferential" Aid to Religion, *supra*, 27 Wm. & Mary L. Rev. at 922. After the *Smith* decision, the redundancy is gone, replaced with a new anomaly: the Establishment Clause (if reduced to preventing coercion) is the primary constitutional bulwark for protecting the exercise of an individual's conscientious religious beliefs!

B. The Court should use the earliest possible opportunity to correct the radical diminution of judicial protection of free exercise of religion that it announced in *Employment Div. v. Smith*.

Last Term, on January 17, 1990, the Court relied unanimously on the "compelling state interest" standard that had given some hope of meaningful judicial protection of the Free Exercise Clause. *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990); see also the unanimous opinion of the Court in *Frazee v. Illinois Dep't. of Employment Sec.*, 489 U.S. 829 (1989). On April 17, in *Employment Div. v. Smith*, a majority of the Court announced a sudden departure from the free exercise jurisprudence it had elaborated in *Sherbert*. It did so without briefing or argument in an opinion that

commentators have already noted to contain serious flaws.¹³ In effect, *Smith* reduced judicial protection of free exercise of religion as an independent constitutional value to a virtual nullity. The impact of this case on the lower courts has already been a severe blow to protection of free exercise of religion.

Amici raise the issue of the *Smith* case because the free exercise provision must be construed in harmony with the nonestablishment provision to achieve the common purpose of the Religion Clause, the protection of religious liberty.¹⁴ For this Court to adjust its non-establishment jurisprudence without restoring constitutional significance to the free exercise provision would be like overhauling the jet engine on one wing of an airplane while leaving the other engine inoperable. The Court should use the earliest possible opportunity to correct its radical diminution of judicial protection of free exercise of religion in *Smith*.

¹³ See, e.g., Laycock, *The Remnant of Free Exercise*, 1990 S. Ct. Rev. ____; Laycock, *The Supreme Court's Assault on Free Exercise and the Amicus Brief That Was Never Filed*, 8 J. L. & Relig. 71 (1990); McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109 (1990); and Gordon, *Free Exercise on the Mountain Top*, 79 Calif. L. Rev. ____ (1991).

¹⁴ See, e.g., McConnell, *Accommodation of Religion*, 1985 S. Ct. Rev. 1; and see McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

CONCLUSION

The Court of Appeals should be reversed.

Respectfully submitted,

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October Term, 1990

Robert E. Lee, et al.,
Petitioners,

v.

Daniel Weisman, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

**BRIEF AMICUS CURIAE OF
NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF PETITIONERS**

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No. 90-1014

In the
Supreme Court of the United States

October Term, 1990

Robert E. Lee, et al.,
Petitioners,

v.

Daniel Weisman, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF AMICUS CURIAE OF
NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS

This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation

of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

STATEMENT OF THE CASE

Amicus incorporates by reference thereto the statement of the case contained in brief of Petitioners.

ARGUMENT

I. Introduction

NSBA filed a brief in this case at the petition level urging this Court's review but informing the Court that NSBA would take no position on the merits because of philosophical differences on the issue among its members. As noted in its earlier brief, Amicus distances itself from the manner in

which Petitioners addressed the issue in their brief. However, Amicus strongly disagrees with the statement of the issue in the United States' brief amicus curiae and with its discussion of the test established in Lemon v. Kurtzman, 403 U.S. 602 (1971), and the cases decided by this Court under that test and, therefore, has been forced to file a brief herein to state its views on the viability of the Lemon test.

U.S. Supreme Court Rule 37.3 requires a brief amicus curiae to identify the party supported or, in the alternative, whether it supports affirmance or reversal of the decision below. Thus, Amicus NSBA has identified the Petitioners as the party supported. However, if given its preference, Amicus NSBA would remain neutral in this case and term its brief in support of the Lemon test.

II. Rejecting the Lemon analysis based on the absence of coercion from practices that accommodate our nation's religious

heritage would undermine establishment clause values recognized in longstanding precedent.

Amicus NSBA strongly disagrees with the position taken by the United States that the Court should take the opportunity in this case to "reconsider the application of the Lemon test to the attempts to accommodate the Nation's religious heritage in our public life." Brief for United States as Amicus Curiae at 8, Petition for Certiorari filed in Lee v. Weisman, No. 90-1014 (U.S. Feb. 22, 1991) (hereinafter, "U.S. Amicus Brief"). While Amicus NSBA recognizes the concerns of many including some members of this Court, regarding the inflexibility and difficulties in applying the Lemon test, see, e.g., Aguilar v. Felton, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting); Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting), it wholeheartedly concurs with Justice Souter's statement made during his confirmation hearings that the test should not

be abandoned without development of a viable substitute. The analysis proposed by the United States as a replacement for the Lemon test in this case presents no such viable alternative.

A. Absence of coercion is an inappropriate means of determining an establishment clause violation.

To accommodate religious heritage in civic life, the United States urges the Court to replace the Lemon test with a "single careful inquiry into whether the practice at issue provides direct benefits to a religion in a manner that threatens the establishment of an official church or compels persons to participate in a religion or religious exercise contrary to their consciences." U.S. Amicus Brief at 15. This test is potentially more problematic than the Lemon test as it fails to differentiate between the free exercise and establishment clause of the first amendment.

Coercion is a factor appropriately considered when violations of free exercise rights are asserted, however, it should not be co-opted into establishment clause analysis, merely to permit "accommodation" of the Nation's religious heritage. The Court stated in Engel v. Vitale, 370 U.S. 421, 430 (1962):

"The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."

While the issue of voluntariness is an appropriate factor in free exercise cases, the focus in establishment clause cases should be on whether the state's conduct endorses or appears to endorse religion. L. Tribe American Constitutional Law 1284-1285 (1988).

Maintaining this distinction between establishment clause and free exercise analysis is especially important, given that the religious heritage of this country is

extraordinarily diverse and becoming more so.

To use a coercion standard in the manner proposed by the United States would ignore this distinction. Under the proposed analysis, no state religious activity that "simply. . . acknowledge[s] the existence of beliefs important to the community," U.S. Amicus Brief at 17, n. 20, would offend the Constitution unless one is coerced into participating in it. It would not matter how extensive the religious activities became or how offensive the activity might be to nonadherents, as long as no one was forced to actually participate. There apparently would be no inquiry into the religious practice itself or its effect on the adherent, the only consideration being whether the government coerced participation in the practice. Such a test could arguably permit a school to conduct a communion service in honor of graduation, provided no one is compelled to participate in the service. Such a test would be appropriate

for free exercise purposes but not for the purpose of whether the government is establishing religion.

The proposed standard also presents difficulties in determining what constitutes "coercion." For example, the federal government, characterizing the practice at issue here as "manifestly benign," apparently believes that government coercion is not present. Although certainly students might perceive significant differences between the level of "endorsement" of religion in an invocation given at graduation ceremonies as opposed to daily prayers recited in the classroom, it is dissembling to say that no level of coercion occurs when students and their families must at least silently tolerate invocations and benedictions at graduation in order to participate in the remainder of the commencement exercises. The only other "choice" is to forego attendance at what is one of the most important occasions in a

student's academic career. Graduation day certainly signifies more to the graduate and his or her family than merely as the day diplomas are distributed.

Commencement is an impressive and memorable occasion in every secondary school in the United States. It represents the achievement of a goal that students, their parents, and their teachers have worked long and hard to attain. The ritual that surrounds the commencement ceremony bespeaks the significance and dignity Americans place on this very important moment in the life of every student who graduates.

Owen B. Kiernan, Foreword to NASSP [National Association of Secondary School Principals] Commencement Manual, Seventh Revised Edition (1975).

B. Adopting the proposed coercion test will call into question precedents established under Lemon.

If the Court decides in favor of Petitioners on the grounds that government accommodation of religion in civic life does not violate the establishment clause absent some form of government coercion, all the

decisions based under the Lemon test would be called into question. Those who want very much to establish religion in the schools will have found the tool to begin chiseling away at the wall of separation between church and state. For example, many religious groups already seek to challenge this Court's school prayer decisions and the parochial school aid cases on the ground that they interfere with the ability of the school to "accommodate the Nation's religious heritage." It is frightening indeed to contemplate the chaos that would unfold from an implicit reversal of Lemon, particularly at this time.

The United States Amicus brief appears to urge reconsideration of Lemon only in areas outside financial assistance to religious institutions. While Amicus NSBA agrees that it is particularly important that the precedents in this area be expressly left intact, it does not believe that the Court could adopt the coercion analysis without also

producing the perception that the aid to parochial school cases were implicitly reversed. Levitt v. PEARL, 413 U.S. 472 (1973) (statute which provided for reimbursement of nonpublic schools for expenses of certain tests but included no means to ensure tests were free of religious instruction violated establishment clause); Sloan v. Lemon, 413 U.S. 285 (1973) (statutes providing tuition reimbursement to parents of students in nonpublic school unconstitutionally advanced religion); PEARL v. Nyquist, 413 U.S. 756 (1973) (maintenance and repair grants to nonpublic schools and tax benefits to parents with children enrolled in nonpublic schools impermissibly advance religion); Meek v. Pittenger, 421 U.S. 349 (1975) (direct loan of instructional materials and equipment to nonpublic schools and provision of certain auxiliary services for students in nonpublic schools violate establishment clause; lending textbooks to

children in nonpublic schools is constitutional); Wolman v. Walter, 433 U.S. 229 (1977) (loan of textbooks to private school students and providing standardized tests, scoring services, speech and hearing diagnostic services in the nonpublic schools and therapeutic services at a neutral site are constitutional; provision of instructional materials and equipment and unrestricted transportation and services for field trips are unconstitutional); PEARL v. Regan, 444 U.S. 646 (1980) (cash reimbursement to private religious schools for cost of administering and grading of state written tests does not violate first amendment); Mueller v. Allen, 463 U.S. 388 (1983) (allowing deductions from state income tax for educational expense incurred by parents of elementary and secondary school students does not violate establishment clause); Aguilar v. Felton, 473 U.S. 402 (1985) (placing public school teachers in private religious schools to

provide remedial services under federal statute violates the Constitution); School District of Grand Rapids v. Ball, 473 U.S. 373 (1985) (school district violated establishment clause by paying private religious school teachers to teach private school students on religious school premises and sending public school teachers to private schools to teach supplemental courses).

Adoption of the coercion standard would also make suspect this Court's school prayer precedents. See, e.g., Wallace v. Jaffree, 472 U.S. 38 (1985) (moment of silence statute intended to bring prayer into classroom struck down); Stone v. Graham, 449 U.S. 39 (1980) (posting of Ten Commandments in public school classrooms held unconstitutional); Abington School District v. Schempp, 374 U.S. 203 (1963) (Bible reading and prayer not permissible in public schools; cited in Wallace in applying the purpose prong of the Lemon test); Engel v. Vitale, 370 U.S. 421

(1962) (recitation of state composed prayer in public schools is unconstitutional; cited in Wallace in applying purpose prong of Lemon test). Since those cases did not raise the question of sponsorship of any particular religion, under the proposed coercion test, the sole inquiry would be whether the school compelled students to participate in the prayers. If the Court finds no coercion in the case at bar, it could be argued that when a child is permitted to opt out of any religious practice in the school, there likewise is no coercion that would make the practice unconstitutional.

III. The Present Controversy Does Not Require the Court to Develop a New Test for Determining Establishment Clause Violations.

A. The Lemon test has enabled courts to strike down impermissible establishment of religion in the schools.

The United States' Amicus brief in effect urges this Court to engage in "judicial activism" to create a substitute for the Lemon

test. This Court traditionally will not decide constitutional questions in broader terms than are required by the precise state of facts to which the ruling is to be applied, nor if the record presents some other ground upon which to decide the case. Rescue Army v. Municipal Court, 331 U.S. 549, 568-575 (1947). See also, Berea College v. Kentucky, 211 U.S. 45, 53 (1908); Siler v. Louisville & N.R.R. Co. 213 U.S. 175, 191 (1909).

"A jurist is not to innovate at pleasure...He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles.

B. Cardozo, The Nature of the Judicial Process 141 (1921).

For twenty years application of the Lemon test has enabled courts to prevent government establishment of religion in the classroom. See, e.g., Wallace v. Jaffree, 472 U.S. 38 (1985) (struck down moment of silence statute intended to bring prayer into public schools);

Edwards v. Aguillard, 482 U.S. 578 (1987) (statute requiring teaching of creation science struck down on grounds it had no secular purpose); Stone v. Graham, 449 U.S. 39 (1980) (posting Ten Commandments in public school classroom held unconstitutional).

While it is indisputable that the Lemon test has produced analytical difficulties for this Court and others, its principal liability--its inflexibility--has also been its principal asset in the context of public schools. School board members and educators understand that the Lemon test applies to all religious practices that are conducted by schools. Although this does not guarantee that no teacher will ever lead students in prayer in the classroom during school time or engage in other forbidden conduct, school board officials and school administrators recognize that the practice is unconstitutional or at least that continuation of the practice places them at risk of a

lawsuit. Ethnic and religious diversity has characterized our society, with schools reflecting such differences. It is a tribute to our institutions that by not interfering, this diversity has not torn our social fabric.

If establishment clause precedent is suddenly thrown into disarray by abandoning the Lemon test, schools will face the very kind of religious divisiveness against which the first amendment is intended to guard. See, e.g., Lemon, 403 U.S. at 622.

B. Expansion of Marsh does not undermine applicability of Lemon for determining establishment clause violations.

If this Court should determine that the practice of the school district here is unconstitutional because it violates the Lemon test, many school districts and their communities would be disturbed by the ruling and it would certainly have a major effect on

the practices of most school districts.¹ Irrespective of outcome, however, a ruling would clarify what has been a murky area of the law and certainly would not result in any diminution in the education of school children. (Graduation ceremonies could be solemnized through other means, such as music, poetry readings or moments of silence.)

The Court could also decide this case by expanding Marsh v. Chambers, 463 U.S. 783 (1983), as did the Sixth Circuit in Stein v. Plainwell Community Schools, 822 F.2d 1406 (6th Cir. 1987). Amicus agrees with the United States that one interpretation of Marsh

¹ NSBA did an informal survey of large school districts throughout the country to determine the extent to which the districts are currently permitting invocations and benedictions at graduation. Out of 21 districts surveyed, representing a total student enrollment of 2,652,571, 14 of the districts representing 1,472,103 students, allow graduation invocations. Some of the districts that reported that they do not allow invocations stated that this is a new policy resulting from fear of litigation or adverse press coverage. Generally, the districts reported that the invocations were "non-denominational," some led by students and others led by ministers. The representatives of the surveyed districts recognized the current potential for litigation, but stated that most of the community does not equate invocations with "school prayer" and supports continuation of the practice.

could result in overturning any civil ceremonial prayer that was not a practice at the time of the drafting of the Constitution. But Marsh could also be interpreted differently, as a recognition that the history of a practice is relevant in determining whether the practice has lost its religious significance, thus making it possible for the state to engage in the practice without establishing "religion." Although such expressions as "In God We Trust" may have religious roots, through repetition and context they have lost their original religious significance. Recognition of this metamorphosis underlies the Marsh decision. It could be argued that only by applying the Lemon test can the Court decide whether the controversy is of a religious nature, and if it is not, then Lemon would not be applicable.

IV. Conclusion

Whatever the decision on the merits in this case, Amicus urges the Court to expressly

affirm the precedent established in its school prayer and aid to parochial school decisions under Lemon.

However difficult the Lemon test may sometimes be to apply, it has been the test for 20 years and school people, students and parents have relied on it. If the Court in this case develops a "new test" assuredly that action will send out a message to schools, students, parents and communities throughout this country that all of the religion in the schools cases are no longer "good law" or at least are questionable.

Amicus submits that this Court should not disturb the Lemon test in the absence of a serious and very important reason to do so. Amicus has informed this Court of the importance of graduation ceremonies. But the validation of graduation invocations is not a reason to disturb Lemon, particularly where there are narrow grounds on which the Court can resolve the controversy, as in this case.

The issue here is important and deserves to be resolved, but not so as to loosen the underpinnings of the school religion cases. Any serious move from the strong stand this Court has held in the past to separate religion and the state will be a clarion call to those who are working to establish religion in the schools.

Our country is unique in the world in its protection of religious freedom. That protection is so fundamental that the Constitution mandates the State to leave all religions alone.

Amicus urges this Court to reaffirm that principle and continue its support of the Lemon test and the cases decided thereunder.

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1990

ROBERT E. LEE, Individually and
as Principal of Nathan Bishop Middle School, *et al.*,
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v.

DANIEL WEISMAN, etc.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the First Circuit

**ALTERNATIVE MOTION FOR LEAVE TO FILE BRIEF
AND BRIEF OF THE BOARD OF EDUCATION OF
ALPINE SCHOOL DISTRICT, A BODY CORPORATE
AND POLITIC OF THE STATE OF UTAH, AS AMICUS
CURIAE IN SUPPORT OF PETITIONERS**

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**On Writ of Certiorari to the
United States Court of Appeals for the First Circuit**

**ALTERNATIVE MOTION FOR LEAVE TO FILE BRIEF
OF THE BOARD OF EDUCATION OF ALPINE SCHOOL
DISTRICT, A BODY CORPORATE AND POLITIC OF
THE STATE OF UTAH, AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

The Board of Education of Alpine School District is, by statute and case law, a political subdivision and instrumentality of the State of Utah. Utah Code Annotated §§ 53A-3-401 and -402; *Harris v. Tooele County Sch. Dist.*, 471 F.2d 218 (10th Cir. 1973). Accordingly, pursuant to Rule 37.5 of the rules of this Court, consent to the filing of this brief amicus curiae in support of petitioners is not necessary.

Alternatively, pursuant to Rule 37.3 of the rules of this Court, amicus curiae respectfully moves for leave to file the attached brief amicus curiae in support of petitioners. Consent of the parties to the filing of this brief has been requested and received from petitioners but not yet received from respondent.

The Alpine School District includes five public high schools located in central Utah. It is the position of Alpine that school districts, graduating students and the public have an interest in preserving the right to continue the tradition of ceremonial prayer at public graduation ceremonies. Alpine's long-time policy and practice is to permit graduating students to offer a voluntary, nondoctrinal, nonproselytizing invocation or benediction at graduation ceremonies.

Alpine School District is a named defendant in the case of *Albright v. Board of Education*, ___ F. Supp. ___, 1991 W.L. 80008 (D. Utah, May 15, 1991), in which the plaintiffs seek to permanently enjoin prayer at high school graduation ceremonies. The district court stayed all proceedings pending a decision by this Court in *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I.), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991). The facts and issues in *Albright* are similar to those presented in *Weisman*. One factual difference is that the graduation prayers at issue in *Albright* are offered by graduating students rather than clergy. Accordingly, Alpine has a direct interest in this case and will argue the issues from the perspective of graduating high school students rather than middle school students. The decision of the court of appeals should be reversed under proper Establishment Clause analysis. Alpine's interest is more fully set forth under Interest of Amicus Curiae in the attached brief.

For the foregoing reasons, the Board of Education of Alpine School District respectfully requests that it be permitted to participate in this case by filing the attached brief amicus curiae.

Respectfully submitted,

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CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

An invocation and benediction have been spoken at high school graduation ceremonies within the Alpine School District for as long as records of those events have been maintained—at least 80 years. It is the policy of the District neither to promote nor prohibit such prayers, but to permit them to be spoken by graduates on a voluntary, nondiscriminatory basis, at the request of the graduating class, without the endorsement or involvement of school

officials. Participating graduates are selected on a voluntary basis according to class scholastic standing, without regard to religious affiliation, preference, or belief. School officials exercise no control over the content of the prayers, other than to counsel participating students to speak in nonsectarian, nondoctrinal, and nonproselyting terms so as to represent and respect diverse views. No prepared text of a prayer is reviewed or approved in advance by school officials. The views expressed are strictly those of the graduate.

Over the years, the Alpine School District has consciously sought to strike a neutral balance with respect to high school graduation prayer that neither endorses nor proscribes the practice. The District does not require that graduation prayers be included in graduation ceremonies; it simply permits their inclusion. In this non-coercive setting, a decision to disallow graduation prayer would be widely viewed by students and patrons of the Alpine School District as a public manifestation of hostility toward religion and at a minimum as a break with traditional patterns of accommodation and toleration for religious expression. Alpine's primary interest in this case is to avoid being thrust into a role in which it will be obligated to inhibit traditional religious expression.

The graduation ceremony is a public event. It is held after school hours, after completion of all regular school instruction for the year, on or off school premises depending on the size of school facilities and expected attendance, and is not part of the official curriculum. The purpose of the ceremony is to recognize and celebrate the honors and achievements of the graduating class. Attendance at graduation, for graduating students as well as faculty and staff, is purely voluntary. The ceremony is attended not only by the graduates, but by their families and friends, interested faculty and staff, special guests, and the public at large. The graduation program is planned, conducted, and presented with input from the graduating

class and school officials. The program typically lasts approximately two hours, and includes a processional, Pledge of Allegiance, invocation, welcoming remarks, several speeches, musical numbers, awards and presentations, benediction, and recessional. The invocation and benediction typically occupy one or two minutes of the program and add no incremental cost to the District.

The District's purposes for permitting the invocation and benediction at graduation ceremonies are (1) to add solemnity, dignity, and decorum to the occasion; (2) to allow graduates to express their deepest sentiments of gratitude, love, and hope for the future; (3) to allow graduates to acknowledge time-honored traditions and values; and (4) to allow broader student participation and expression in the ceremony. The invocation and benediction are not intended as a religious exercise or to advance religion or any particular religious belief. The content of the pronouncements is not officially endorsed or approved by the District or the school, and no particular religion or religious creed is represented or referred to by word, act, clothing, symbol or otherwise.

In August of 1990, a teacher, a counselor, four students, and two parents within the Alpine School District filed suit in the United States District Court for the District of Utah to enjoin the School District from permitting prayer at high school graduation ceremonies. *Albright v. Board of Education*, ___ F. Supp. ___ (D. Utah, May 15, 1991). The plaintiffs alleged that they are "personally offended" by prayers spoken at public graduation ceremonies, and that the District and school officials violate the Establishment Clause of the United States Constitution by permitting graduation prayer, as outlined above. Following limited discovery and a hearing, the district court, Judge J. Thomas Greene, stayed further proceedings pending this Court's decision in the present case. On May 15, 1991, following a second hearing, Judge Greene denied plaintiffs' motion for preliminary injunction, ruling in a written opin-

ion that plaintiffs had not demonstrated a substantial likelihood of prevailing on the merits. *Id.*

This case is of particular concern to Alpine School District because the decision here will directly affect the result in *Albright v. Board of Education*, *supra*, to which Alpine is a party. The facts here vary somewhat, such as in the involvement of clergy as opposed to graduates in delivery of the prayers; however, the lower courts did not consider that difference significant. *Weisman v. Lee*, 728 F. Supp. 68, 72 (D.R.I.), *aff'd*, 908 F.2d 1090 (1st Cir. 1990). The legal questions presented here are, in large part, the same as those awaiting resolution in *Albright*. Accordingly, Alpine School District has a direct interest in calling the Court's attention to relevant points of law and policy that require reversal of the judgment of the court of appeals.

Alpine is anxious to receive clear guidance that will obviate the need for future disputes over graduation prayer and the associated litigation costs. However, this is not an area in which any arbitrarily selected bright line will do. Far more important than finding "any single test or criterion in this sensitive area"—something this Court has wisely and repeatedly refused to do, *see Lynch v. Donnelly*, 465 U.S. 668, 679 (1984)—is the need to find a resolution that does justice to the deep traditions of religious liberty and mutual toleration that are and must remain the hallmark of American constitutionalism.

The Alpine School District respectfully submits that this can best be done by according local school boards discretion, within appropriate limits, to accommodate voluntary graduation prayers that reflect varied religious traditions. Different states, and within states, different localities, may choose to take different approaches in this area. Deference to such local differences in actualizing religious liberty has been with us since the framing of the Establishment Clause. In the graduation prayer context, the appropriate counterpart to such deference is to respect good faith and

non-coercive efforts of local school boards to foster religious liberty in ways that make sense in their local communities. After all, what may be perceived in one area as "benignly neutral" separation may be experienced elsewhere as impermissible hostility toward religion. Surely in a tradition that celebrates freedom of *expression*, coerced silence cannot be the only mode of achieving religious liberty.

SUMMARY OF ARGUMENT

The proper method for analyzing graduation prayer under the Establishment Clause is the historical approach used in *Marsh* rather than the three part test set forth in *Lemon*. Mechanical application of the *Lemon* test has produced inconsistent and unprincipled results. Moreover, this Court's dicta that *Lemon* should be used in the public school context applies only to *classroom* religious activities, not to a public graduation ceremony. There is no historical basis for the notion that public schools, including graduation ceremonies, must be entirely secular. Graduation prayer is more analogous to the legislative prayer upheld in *Marsh* than to the classroom religious activities analyzed under *Lemon*; accordingly, *Marsh* provides the more appropriate analysis.

In reviewing the objectives of the Establishment Clause as set forth in decisions of this Court, it is evident that no absolute separation of government and religion is intended or possible. Rather, the Establishment Clause mandates government neutrality and accommodation of religion. Under the *Marsh* analysis, graduation prayer does not violate Establishment Clause objectives. It poses no more potential for establishment than other traditional ceremonial prayers offered in judicial and legislative bodies and other public meetings throughout the country.

Alternatively, graduation prayer also passes scrutiny under the *Lemon* test. It serves the school district's secular

purposes of solemnizing the occasion and allowing for broader student participation and expression. The purpose need not be exclusively secular. The primary effect of graduation prayer, when viewed in the overall graduation context, is not government endorsement of religion. School officials do not give the prayer; they do not require the prayer; they do not preview or monitor the prayer; and they do not endorse the content of the prayer. They merely permit the prayer to be spoken in a public setting, on a voluntary, nondiscriminatory, nondoctrinal basis. The prayer does not result in excessive government entanglement with religion, for the same reasons mentioned above.

ARGUMENT

I. GRADUATION PRAYER IS A FORM OF TRADITIONAL, PUBLIC CEREMONIAL PRAYER UPHOLD BY THIS COURT IN *MARSH V. CHAMBERS*.

A. Propriety of *Marsh* Analysis Over *Lemon* Test

Lower federal courts are divided on the proper analysis of graduation prayer under the Establishment Clause. For example, the lower courts in this case applied the three-part test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to enjoin graduation prayer, 728 F. Supp. at 71; 908 F.2d 1090, while the court in *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1409 (6th Cir. 1987), applied the historical analysis in *Marsh v. Chambers*, 463 U.S. 783 (1983), to uphold graduation prayer. In the two most recent federal court decisions, *Jones v. Clear Creek Independent Sch. Dist.*, 930 F.2d 416 (5th Cir. 1991), and *Albright v. Board of Education*, ___ F. Supp. ___ (D. Utah, May 15, 1991), the first upheld graduation prayer using the *Lemon* test, while the second held that graduation prayer would likely be constitutional under either analysis. Graduation prayer is more analogous to the public ceremonial prayer upheld in *Marsh* than to the classroom religious activities analyzed by this Court under the *Lemon*

test; accordingly, the *Marsh* analysis more naturally applies to this case.¹

The *Lemon* test, with all three prongs, was never intended to apply in every Establishment Clause case. In *Lemon* itself, which applied the "entanglement" prong to invalidate state aid to religious schools, Chief Justice Burger's opinion for the Court noted that "[e]very analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years." 403 U.S. at 612. The Court subsequently reemphasized that the *Lemon* criteria "must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek v. Pittenger*, 421 U.S. 349, 359 (1975). In *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984), Chief Justice Burger again wrote for the Court: "[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."²

Mechanical application of the *Lemon* test has led to extreme, unpredictable and anomalous results in serious conflict with the intended meaning of the Establishment Clause. For example, a state may pay for bus transportation to religious schools, *Everson v. Board of Education*, 330 U.S. 1 (1947), but may not conduct speech and hearing services in those schools, *Meek v. Pittenger*, *supra*. A local government may not erect a Nativity scene on public property, *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086 (1989), unless the display also

¹ In addition to the recent federal cases, the California Supreme Court recently considered the graduation prayer issue in *Sands v. Morongo Unified School District*, ___ P.2d ___, 1991 W.L. 73348 (Cal., May 6, 1991). While the court disallowed graduation prayer under *Lemon*, a majority would have preferred to permit the practice under *Marsh*.

² Subsequently, in opposing the mechanical application of the *Lemon* test to invalidate a moment of silence law in *Wallace v. Jaffree*, 472

includes a Santa Claus house, *Lynch v. Donnelly*, 465 U.S. 668 (1984). The Bible may be used to teach comparative religion, history, or literature in public schools, *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963), but the teacher may not read from it privately or keep it on his desk, *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990). Because of the inconsistent and unprincipled results produced by the *Lemon* test, a majority of the current members of this Court has expressed dissatisfaction with it. See, e.g., *County of Allegheny, supra*, 109 S. Ct. at 3134 (Kennedy, J., concurring and dissenting in part); *Jaffree, supra*, 472 U.S. at 112 (Rehnquist, J., dissenting); *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting); *Roemer v. Board of Public Works*, 426 U.S. 736, 768 (1976) (White, J., concurring); *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

The lower courts in this case relied on dicta in *Edwards v. Aguillard, supra*, and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), for the proposition that the *Lemon* test should *always* be used in the public school context. 728 F. Supp. at 70; 908 F.2d at 1093-94. However, the statements in *Edwards* and *Ball* are specifically directed and applied to the potentially coercive context of the public school classroom. *Edwards* invalidated a statute

U.S. 38, 89 (1985), Chief Justice Burger rejected the Court's "naive preoccupation with an easy, bright-line approach for addressing constitutional issues":

We have repeatedly cautioned that *Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide "signposts." . . . [O]ur responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion. Given today's decision, however, perhaps it is understandable that the opinions in support of the judgment all but ignore the Establishment Clause itself and the concerns that underlie it. [Burger, C.J., dissenting.]

requiring the teaching of "creation science" in public classrooms. The Court noted that it has been "vigilant in monitoring compliance with the Establishment Clause" in public schools because families expect that "the classroom will not purposely be used to advance religious views," and because "[s]tudents in such institutions are impressionable and their attendance is involuntary." 482 U.S. at 583-84 (emphasis added). *Ball* held impermissible a school district program providing classes to nonpublic school students at public expense in the nonpublic school classrooms. The Court noted that it applied the *Lemon* test to cases involving "the sensitive relationship between government and religion in the education of our children" because "government's activities in this area have a magnified impact on impressionable young minds." 473 U.S. at 383. Both *Edwards* and *Ball* cited the line of cases invalidating various forms of religious activities in the classroom, including *Wallace v. Jaffree*, 472 U.S. 38 (1985) (daily classroom moment of silence for "meditation or voluntary prayer"); *Stone v. Graham*, 449 U.S. 39 (1980) (mandatory posting of Ten Commandments on each classroom wall); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (daily classroom Bible reading and recitation of Lord's Prayer); *Engel v. Vitale*, 370 U.S. 421 (1962) (daily classroom recitation of state-composed prayer); and *McCollum v. Board of Education*, 333 U.S. 203 (1948) (classroom religious instruction on school premises during school hours).

The context and circumstances of graduation prayer are entirely distinguishable from the classroom religious involvement in *Edwards* and *Ball* and the line of cases on which they rely. The controlling circumstances common to most or all of those cases are: (1) the purpose of the challenged practice was primarily, if not entirely, religious; (2) the practice occurred on a daily basis, increasing the risk of indoctrination; (3) the practice occurred in the classroom, during school hours, with the direct involvement of

the teacher, increasing the risks of coercion and endorsement; (4) daily attendance in the classroom was mandatory and student participation was required, making it difficult for students to avoid the practice; (5) the state provided or designated the content and manner of the practice; (6) the practice required expenditure of public funds; and (7) the students were all young and impressionable and away from the influence of parents, increasing the risk of indoctrination. Such is not the case in the high school graduation context.

Graduation prayer has acknowledged secular purposes of lending solemnity to a public occasion, *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring), and of respecting historical practices. See *Marsh v. Chambers*, 463 U.S. 783 (1983). It occurs only once a year, and only once in each student's lifetime. It occurs out of the classroom, in a meeting open to the public, after school hours, after all course instruction is completed, and without the potential for indoctrination from teachers or school officials. Both attendance and participation are voluntary. The school does not prescribe or endorse the content or manner of giving the prayer. The prayer consumes no public funds; and the graduates have reached a stage in their lives when they are sufficiently mature to be able to distinguish between official endorsement and legitimate accommodation of religion. This is particularly true in the Alpine School District, where graduation prayer occurs only at the high school level. Moreover, the ceremonies occur in the presence of parents and other adults whose presence effectively buffers any indoctrinating effect. Because of these important distinctions, the cited cases are inapposite to the graduation prayer analysis and the *Lemon* test need not apply.

Another perceived obstacle to application of the *Marsh* analysis, noted by *Edwards* and relied upon by the lower courts in this case, is the dictum that a historical approach is not useful in the public school context, "since free public

education was virtually nonexistent at the time the Constitution was adopted." 482 U.S. at 583 n.4. See also *Ball, supra*, at 390 n.9. However, that assertion is not entirely accurate. Like legislative prayer, graduation prayer has a long, continuous tradition predating the founding of America. Prayer was part of the first graduation ceremonies conducted at Oxford, England in the twelfth century. In America, the tradition began at Harvard University in 1642. Public schools, which were introduced in the colonies as early as 1647, and became universal in New England during the 1700's, simply followed the college graduation format, including prayer. Fink, *Evaluation of Commencement Practices in American Public Secondary Schools* 20-24 (1940); K. Sheard, *Academic Heraldry In America* 71 (1962); P. Ryan, *Historical Foundations Of Public Education In America* 186-218 (1965); P. Monroe, *Founding of the American Public School System* 196 (1940). Accordingly, while public schools were not widespread when the First Amendment was ratified, they were certainly prevalent enough that their existence and religious practices were known to the Founders. DuPuy, *Religion, Graduation, and the First Amendment: A Threat or A Shadow?* 35 Drake L. Rev. 323, 356-64 (1985-86). See also *Schempp, supra*, 374 U.S. at 238, 267-70; *Weisman, supra*, 728 F. Supp. at 73 ("There is no factual basis for an historical argument that the first amendment was intended by the drafters to isolate religion from education."). Concerned with more substantial worries of institutional entanglement, the Framers would no doubt have been startled by the notion that a ceremonial prayer could constitute an establishment of religion.

The *Edwards* footnote discounting the *Marsh* historical approach is also misleading in suggesting that only those practices extant when the Establishment Clause was adopted are permissible today. This Court has approved displays commemorating religious holidays even though they were not commonplace in 1791. As stated by four

members of the Court in *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086, 3141-42 (1989):

[T]he relevance of history is not confined to the inquiry into whether the challenged practice itself is a part of our accepted traditions dating back to the Founding.

... *Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings. Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion. . . . A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause. (Kennedy, J., concurring and dissenting in part).

Thus, contrary to the district court's conclusion in this case, that "[t]he *Marsh* holding is narrowly limited to the unique situation of legislative prayer," 728 F. Supp. at 74, *Marsh* stands for the broader truth that public ceremonial acknowledgments of religion have been commonplace from the time of our Founding to the present and pose no more threat to the Establishment Clause now than in 1791. Because graduation prayer occurs outside the classroom context and bears the same traditional, public, and ceremonial features as a legislative prayer, it is proper to analyze it under the principles enunciated in *Marsh*.

B. Application of *Marsh* Analysis

In *Marsh v. Chambers* this Court focused on the original objectives of the Establishment Clause and examined the

challenged practice of legislative prayer in the light of history and tradition to determine whether the practice is consistent with those objectives. "Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the [challenged] practice." *Marsh*, *supra*, 463 U.S. at 790. "[T]he 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *County of Allegheny*, *supra*, 109 S. Ct. at 3121 (O'Connor, J., concurring in part and concurring in the judgment). See also *Wallace v. Jaffree*, *supra*, 472 U.S. at 79 (O'Connor, J., concurring in judgment) ("Particularly when we are interpreting the Constitution, 'a page of history is worth a volume of logic.'"). Under this analysis, graduation prayer falls within the objectives of the Establishment Clause, both as originally intended and as historically applied.

1. Establishment Clause Principles

Most scholars agree, based on the historical context, the textual evolution, the congressional debates, and contemporaneous government actions, that the Establishment Clause was originally intended to foreclose the establishment of a national religion, by means of coerced support or participation, through preferential benefits to religion, or otherwise. *Lynch v. Donnelly*, *supra*, 465 U.S. at 672-78; *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 (1982); *County of Allegheny*, *supra*, 109 S. Ct. at 3136 (Kennedy, J., concurring and dissenting in part); *Wallace v. Jaffree*, *supra*, 472 U.S. at 106 (Rehnquist, J., dissenting); Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978); Kruse, *The Historical Meaning and*

Judicial Construction of the Establishment of Religion Clause of the First Amendment, 2 Wash. L.J. 65 (1962). *Everson v. Board of Education*, 330 U.S. 1, 15 (1947), expressed the prohibition in broader terms, referring to a "high and impregnable" wall between church and state that precludes any government benefit to religion generally; however, even that absolutist language was held to permit public busing of students to parochial schools. Through the years the Supreme Court has acknowledged that absolute separation is neither possible nor desirable, that religion plays a proper role in public life, and that the proper relationship between government and religion is one of neutrality and accommodation.

In *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), upholding released time from public schools for religious instruction, the Court declared: "We are a religious people whose institutions presuppose a Supreme Being." The Court cited numerous public acknowledgements of religion, from legislative prayers to national holidays, and concluded that it is proper for government officials to respect the religious nature of our people and to accommodate their spiritual needs. *Id.* at 314. To do otherwise "would be preferring those who believe in no religion over those who do believe," *id.*:

[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.
[*Id.*]

The *Schempp* Court agreed that "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion." 374 U.S. at 225.

In upholding tax exemptions for religious organizations in *Walz v. Tax Commission*, 397 U.S. 664, 669-70 (1970),

the Court summarized its position of accommodation, or "benevolent neutrality," toward religion:

The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. . . . No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement.

See also *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 658 n.6 (1980) ("The Court never has held that religious activities must be discriminated against . . .").

Finally, in *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984), upholding a city's inclusion of a Nativity scene in its annual Christmas display, the Court reiterated its accommodationist view of the Establishment Clause:

No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. "It has never been thought either possible or desirable to enforce a regime of total separation . . ." Nor does the Constitution require complete separation of

church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. [Citations omitted.]

Accordingly, the Establishment Clause requires official neutrality tempered by accommodation of religious expression in public life. Government is not required to exterminate religion from public places or to censor acknowledgments of religion from public meetings. To do so would manifest official hostility towards religion, a position which the Establishment Clause also forbids.

2. Graduation Prayer

Against the backdrop of these Establishment Clause principles, *Marsh v. Chambers* addressed the permissibility of daily legislative prayer by a state-paid Presbyterian minister. The Court first noted that public ceremonial prayer "is deeply embedded in the history and tradition of this country." 463 U.S. at 786. Invocations have traditionally been spoken at all sessions of the Supreme Court and other federal courts, as well as in the First Congress and other deliberative bodies throughout the country. Such expressions do not violate the objectives of the Establishment Clause:

To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. [*Id.* at 792.]

In approving legislative prayer, the *Marsh* Court rejected the arguments made here against graduation prayer. For example, even though the prayers were spoken by the same Presbyterian minister for 16 years, they did not con-

stitute forbidden endorsement of the content of the prayer or of the speaker's religion:

We cannot, any more than Members of the Congresses of this century, perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church. [463 U.S. at 793.]

The same would apply where the prayer is offered by a graduate who happens to be a member of the predominant religion of the area. The prayer is not rendered impermissible simply because its content "harmonize[s] with the tenets of some or all religions." *Id.* at 792. Moreover, the prayers were not invalidated by their Judeo-Christian content:

The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer. [*Id.* at 794-95.]

The *Marsh* Court was also unpersuaded by the arguments that public prayer is unconstitutional because it may "offend" or "indoctrinate" some persons in attendance. This is consonant with traditional first amendment doctrines. After all, first amendment protections both of speech and religion are designed to protect freedom of expression, not necessarily to insulate the public from offense.³ When members of the First Congress objected to prayer on the grounds of religious differences, Samuel Adams responded that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at

³ See Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 Ind. L.J. 351 (1991).

the same time a friend to his country." *Id.* at 792, quoting C. Adams, *Familiar Letters of John Adams and his Wife, Abigail Adams*. This response acknowledges our history of religious diversity and perpetuates our tradition of toleration for differing beliefs. See *Lynch v. Donnelly*, *supra*, 465 U.S. at 674-78. Instilling such values in high school graduates supplements the overall educational experience. See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986) (role of public school system is to instill " 'habits and manners of civility' essential to a democratic society. . . , includ[ing] tolerance of divergent political and religious views").

As for indoctrination, *Marsh* notes that "the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination' or peer pressure." 463 U.S. at 792. The same applies to high school graduates, whose attendance at the graduation ceremony is voluntary. See *Schempp*, *supra*, 374 U.S. at 299-300 (Brennan, J., concurring) (approving legislative and other public prayers because those involved "are mature adults who may presumably absent themselves from such public and ceremonial exercises without incurring any penalty, direct or indirect"); *Board of Education v. Mergens*, 110 S. Ct. 2356, 2372 (1990) ("We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.").

Explicit in the *Marsh* analysis is an evaluation of whether the challenged practice poses more potential for establishment than other traditional, legally approved practices. *Id.* at 791. Graduation prayer poses no such threat. All three branches of government, on both state and federal levels, have traditionally approved public prayer and other public references to Deity. Presidents from George Washington to George Bush have called on the nation to

pray.⁴ In fact, the President is required to proclaim a National Day of Prayer "on which the people of the United States may turn to God in prayer." 36 U.S.C. § 169h. Federal courts across the country, including this Court, begin their sessions with the invocation, "God save the United States and this honorable Court." *County of Allegheny*, *supra*, at 3143. Legislative bodies on all levels begin their sessions with ceremonial prayer. *Marsh*, *supra* (state legislative prayer); *Elliot v. White*, 23 F.2d 997 (D.C.

⁴ At the request of the First Congress, President Washington issued a proclamation urging the nation to "unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to . . . promote the knowledge and practice of true religion and virtue." Quoted in *County of Allegheny*, *supra*, at 3142 (Kennedy, J., concurring and dissenting in part). Two hundred years later, on the verge of the Persian Gulf War, President Bush proclaimed a National Day of Prayer:

As one Nation under God, we Americans are deeply mindful of both our dependence on the Almighty and our obligations as a people He has richly blessed. . . .

. . . .

. . . I ask all Americans to unite in humble and contrite prayer to Almighty God. May it please our Heavenly Father to look upon this Nation, judging not our worthiness but our need, and to grant us His continued strength and guidance. . . .

. . . .

. . . Let us pray this day, and every day hereafter, for peace. And may God keep this country as one great Nation under Him forever. [Proclamation 6243—For A National Day of Prayer, February 3, 1991, 27 Weekly Comp. Pres. Doc. 116 (Feb. 1, 1991), *see also*, Proclamation 6280—For a National Day of Prayer, May 2, 1991, 56 Fed. Reg. 19, 521 (1991) (expression of gratitude for successful end of Gulf War).]

It would be anomalous if the Proclamation applied to "all Americans" on "this day, and every day," *except* to high school graduates on their graduation day.

Cir. 1928) (congressional chaplain); *Colo. v. Treasurer and Receiver General*, 392 N.E.2d 1195 (Mass. 1979) (legislative chaplain); *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979) (county board meetings); *Marsa v. Wernik*, 86 N.J. 232, 430 A.2d 888 (1981) (city council meetings); *Lincoln v. Page*, 241 A.2d 799 (N.H. 1968) (town meetings). Our National Motto, required to be inscribed on all currency, is "In God we trust." 36 U.S.C. § 186; 31 U.S.C. §§ 5112, 5114; see *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970); *O'Hair v. Blumenthal*, 588 F.2d 1144 (5th Cir. 1979). Our Pledge of Allegiance to the American Flag, recited in classrooms and graduation ceremonies across the country, declares us to be "one Nation under God." 36 U.S.C. § 172. Public oaths for civil service or jury duty end with the petition, "So help me God." *E.g.*, 5 U.S.C. § 3331; 10 U.S.C. § 502; Utah Code Annotated §§ 11-14-6, 78-24-17. If some persons find these official references and practices to be offensive, their remedy is avoidance, rather than elimination, of the reference or practice. See, *e.g.*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (students may decline flag salute and pledge on religious grounds); *Cohen v. California*, 403 U.S. 15, 21 (1971) (viewers of offensive jacket "could effectively avoid further bombardment of their sensibilities simply by averting their eyes").

It is evident that an annual, once in a lifetime graduation prayer tends no more towards an establishment of religion than the foregoing public acknowledgments of religion that occur on a more pervasive basis. Surely, by the time students reach their high school graduation, they have already been exposed to some or all of the foregoing religious references. At sometime during their educational experience, they likely will have attended a public court or legislative session. They will have witnessed public ceremonies, such as the swearing in of a president or other public official. They likely will have heard of a National Day of Prayer, examined our currency, pledged allegiance

to our Flag, and sung our National Anthem. In short, they will have already recognized that religious expression and tradition are commonplace in our public life and that government can accommodate religion without officially endorsing it or denigrating it. Accordingly, graduation prayer is permissible under this Court's analysis in *Marsh*.

Other federal courts have upheld the practice of graduation prayer using the *Marsh* analysis. In *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), the court faced the same arguments raised here, that graduation prayer is impermissible "school prayer," and the defendants countering that it is more analogous to legislative prayer. *Id.* at 1408. The court held that "[t]he annual graduation exercises here are analogous to the legislative and judicial sessions referred to in *Marsh* and should be governed by the same principles." *Id.* at 1409.⁵ The court distinguished graduation prayer from classroom prayer, noting that graduation prayer serves a ceremonial "solemnizing" function; there is less opportunity for indoctrination or peer pressure; the proceeding is public, with parents in attendance; and there is no teacher-student relationship. *Id.* However, in an apparent deviation from the *Marsh* instruction not "to parse the content of a particular prayer," 463 U.S. at 795, the court concluded that graduation prayers may not invoke the name of Jesus Christ. *Id.* at 1410. *Marsh* did not preclude mention of Jesus Christ in public prayer; it merely noted that such references had been voluntarily removed from the prayers at issue and, therefore, need not be addressed by the Court. 463 U.S. at 793 n.14. It would be difficult "[t]o invoke Divine guid-

⁵ The *Stein* court accurately observed:

To prohibit entirely the tradition of invocations at graduation exercises while sanctioning the tradition of invocations for judges, legislators and public officials does not appear to be a consistent application of the principle of equal liberty of conscience. [822 F.2d at 1409.]

ance," *id.* at 792, as *Marsh* permits, without addressing Divinity.

More recently, the Fifth Circuit in *Jones v. Clear Creek Independent School District*, 930 F.2d 416 (5th Cir. 1991), held that graduation prayer passes constitutional muster using either *Marsh* or the stricter *Lemon* analysis. Judge Reavley, who "inclined to the opinion" that *Lemon* analysis was required, rejected contentions that solemnization was a spurious secular purpose. He viewed graduation prayer as a way to "acknowledg[e] a principle of transcendence, with simple terms of universal understanding—like 'God.'" 930 F.2d at _____. For him, graduation prayer constituted a kind of call to conscience which, properly understood, speaks across religious traditions and indeed, across the divide separating religious and secular. *Id.* at _____. With regard to the effects prong of the *Lemon* test, Judge Reavley emphasized that the graduates hearing the prayer stand on the "threshold of adulthood," and are about to "enter an adult world in which they are expected to tolerate some governmental accommodation of religion." The concurring judges felt it was unnecessary to reach the question of how graduation prayer should be analyzed under *Marsh*, since it already passed the more exacting *Lemon* scrutiny.

Most recently, in *Albright v. Board of Education*, ____ F. Supp. ____ (D. Utah, May 15, 1991), refusing to enjoin voluntary, nonproselytizing student prayers at graduation ceremonies, the court concluded:

In this court's opinion, there is a reasonable likelihood that the Supreme Court will follow its own precedent in *Marsh v. Chambers*, and regard invocations and benedictions at high school graduation ceremonies to constitute an exception analogous to opening ceremonies at legislative sessions. [*Id.* at _____.]

In summary, the Establishment Clause does not require complete exclusion of religion from public life. It mandates

accommodation of the spiritual need for public religious expression. Like legislative and other public ceremonial prayers, graduation prayer "is deeply embedded in the history and tradition of this country." *Marsh, supra*, at 786. Prohibition of graduation prayer would certainly be perceived as "callous indifference" or hostility toward religion, a result neither required nor permitted by the Establishment Clause. *Lynch, supra*, at 673. Allowing high school graduates "[t]o invoke Divine guidance . . . is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh, supra*, at 792. Accordingly, graduation prayer does not violate the Establishment Clause.

II. GRADUATION PRAYER PASSES ESTABLISHMENT CLAUSE SCRUTINY UNDER THE LEMON TEST.

Even if this Court chooses to apply one or more elements of the three-part test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), Alpine respectfully submits that the court of appeals judgment should be reversed under that analysis as well. The standard formulation of the *Lemon* test requires that the challenged practice (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive government entanglement with religion. *Id.* at 612-13. Graduation prayer passes all three parts of the test.

A. Secular Purpose

The district court did not address the purpose prong of the *Lemon* test. 728 F. Supp. at 71. On appeal, Judge Bownes concluded that graduation prayer fails the purpose test because "the primary purpose is religious. . . . It does not serve a purely or predominantly solemnizing function." 908 F.2d at 1095. However, this reasoning runs afoul of governing precedent.

Public prayer, like other forms of speech, may have more than one purpose, depending on the circumstances

and the perspective. Prayer in a chapel may be worshipful, while prayer in a legislative hall serves the ceremonial function. The same prayer on the same occasion may be religious to one person, while secular and ceremonial to another. As the district court noted in *Stein v. Plainwell Community Schools*, 610 F. Supp. 43, 47 (D. Mich. 1985), in refusing to enjoin graduation prayer, the prayer may be religious to the person offering it, while to the audience it is "merely a formal way of opening and closing the graduation ceremony. To these people, the purpose of the prayer will be ceremonial. Thus, the Court recognizes a dual nature of prayer in this context, partly religious and partly ceremonial." *Id.* at 47. See also *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) ("In a pluralistic society a variety of motives and purposes are implicated."). In any event, the proper focus is *not* on the purpose of individual students, the audience, or the person saying the prayer, but on the purpose of the sponsoring governmental entity. *Id.* See also *Widmar v. Vincent*, 454 U.S. 263, 271-73 (1981) (university's policy of providing equal access to all student groups satisfied secular purpose prong even though some student groups met for admittedly religious purposes).

In determining the purpose of a challenged activity, it must be viewed in context, not in isolation. "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch, supra*, at 680. Furthermore, to pass constitutional scrutiny the purpose need not be exclusively secular, or even "predominantly" secular, as Judge Bownes concluded. *Lynch* states:

The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated *wholly* by religious considerations. Even where the benefits to religion were substantial, . . . we saw a secular purpose

and no conflict with the Establishment Clause.
[465 U.S. at 680, emp. added, citations omitted.]

The *Lynch* Court further explained, "Were the test that the government must have 'exclusively secular' objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated." *Id.* at 681 n.6. Applying these principles in *Lynch*, the Court upheld the inclusion of a Nativity scene in a city Christmas display because, in context, despite its religious significance, it had a secular purpose of depicting the historical origins of Christmas as a National Holiday. *Id.* at 680. The fact that its "reason or effect merely happens to coincide or harmonize with the tenets of some . . . religions" did not defeat its secular purpose. *Id.* at 682.

Applying these concepts to graduation prayer, it is evident that the practice passes the "purpose" prong of the test. The invocation and benediction are spoken in the context of the graduation ceremony. The school district's purpose in sponsoring the ceremony is purely secular: to celebrate and honor educational achievement and advancement. The program consists primarily of speeches, musical numbers, and the awarding of honors and diplomas. "All other portions of the program are peripheral to this function." *Grossberg v. Deusebio*, 380 F. Supp. 285, 289 (D. Va. 1974) (refusing to enjoin graduation prayer). The prayers are indeed "peripheral," occupying one or two minutes of the entire program. Accordingly, the context of the prayers is secular.

The school district's purposes in allowing the prayers are also secular: to officially commence and end the ceremony; to add solemnity, reverence, dignity, and decorum to the ceremony; to permit broader participation in the ceremony by deserving graduates; and to continue a long and cherished tradition. Several courts have acknowledged and accepted these secular purposes of ceremonial prayer under Establishment Clause analysis. *County of Allegheny*,

supra, 109 S. Ct. at 3118 (O'Connor, J., concurring) ("[G]overnment acknowledgments of religion in American life . . . such as the legislative prayers upheld in *Marsh* . . . serve the secular purposes of 'solemnizing public occasions, expressing confidence in the future and encouraging the recognition of what is worthy of appreciation in society.'"); *Stein, supra*, 822 F.2d at 1409; *Grossberg, supra*, 380 F. Supp. at 289; *Bogen v. Doty*, 598 F.2d 1110, 1113 (8th Cir. 1979) (refusing to enjoin prayer at county board meetings); *Marsa v. Wernik*, 86 N.J. 232, 430 A.2d 888, 896 (1981) (upholding prayer at city council meetings).

Furthermore, it is of no significance that these admittedly secular purposes could be achieved by secular means. *Lynch* held that it was "irrelevant" whether the city's objectives in erecting the Nativity scene could have been achieved by other means. 465 U.S. at 681 n.7. In *Lynch*, the Court cited numerous public acknowledgments of religion, from presidential proclamations to national holidays, oaths and mottos, whose purposes could conceivably be achieved by other means. *Id.* at 674-77. See also *Jones v. Clear Creek Independent Sch. Dist.*, 930 F.2d 416, — (5th Cir. 1991) (no secular means would serve the solemnizing purpose as well as prayer).

In summary, the school district's purposes for allowing graduation prayer are secular. Those purposes are plainly not "wholly" or even predominantly religious. Therefore, the purpose prong of the *Lemon* test is satisfied.

B. Permissible Effect

Under the second prong of the *Lemon* test, a challenged activity is invalidated if its "primary effect" is either to confer a "substantial benefit" on religion, *Lynch, supra*, at 681, or to "endorse religion," *County of Allegheny, supra*, at 3100. The lower courts held that graduation prayer endorses religion by identifying government with a religious practice. 728 F. Supp. at 73; 908 F.2d at 1095. However, this conclusion is unjustified where the practice

takes place in a public meeting, rather than a classroom; involves high school graduates, rather than young children; and government does no more than permit the practice by private citizens.

As with the purpose inquiry, the effect of graduation prayer must be analyzed in the context of the entire graduation ceremony. See *County of Allegheny, supra*, at 3103 ("effect of a creche display turns on its setting"). The creche in *Lynch* was upheld because the context of the display (with the Santa Claus house) mitigated its religious message, while the religious effect of the creche in *County of Allegheny* was enhanced by its prominent public location for the entire holiday season and the written message, "Glory to God in the Highest." *Id.* at 3103-04. By contrast, the Court observed that it would not be unconstitutional for a group of parishioners from a local church to go caroling through a city park because "activities of this nature do not demonstrate the government's allegiance to, or endorsement of, the Christian faith." *Id.* at 3111. By comparison, the moments of prayer at a graduation ceremony are not the "central" feature of the program. They are more analogous to carolers walking briefly through the public park. Moreover, school officials do not deliver the prayers and do not control their content. Under these circumstances, likelihood of endorsement is minimized. *Grossberg, supra*, 380 F. Supp. at 288-89 (graduation prayer "is so fleeting that no significant transfer of government prestige can be anticipated"); *Wood v. Mt. Lebanon Township Sch. Dist.*, 342 F. Supp. 1293, 1294 (D. Pa. 1972) (upholding graduation prayer).

As noted previously, the concerns with coercion or indoctrination that exist in the classroom context are not present in the graduation ceremony. Not only is attendance voluntary, but particularly in the high school setting, the graduates are adults. In *Widmar v. Vincent*, 454 U.S. 263, 274 (1981), the Court required equal access to university facilities for student religious groups because uni-

versity students are "young adults . . . and should be able to appreciate that the University's policy is one of neutrality toward religion." As noted above, in *Board of Education v. Mergens*, 110 S. Ct. 2356 (1990), the Court applied the same rationale to high school students under the Equal Access Act. *Id.* at 2372 ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Emp. in orig.) The students in attendance at graduation are actually graduates, eligible to become university students. Most are 18 years of age—old enough to vote, to enter the draft, and assume other responsibilities of adulthood. If those graduates are mature enough to discount the endorsement effect of regular student religious meetings on school property, then they should be able to do the same with an annual graduation prayer. See *Jones*, *supra*, at ____ ("these students enter an adult world in which they are expected to tolerate some governmental accommodation of religion"); *Wood*, *supra*, at 1295 ("[T]he fact that the graduation ceremony is not compulsory strips the function of any semblance of governmental establishment or even condonation."); *Wiest v. Mt. Lebanon Sch. Dist.*, 320 A.2d 362, 366 (Pa. 1974) (denied injunction of graduation prayer because primary effect did not advance religion).

In summary, graduation prayer does not have the primary effect of endorsing religion. Accordingly, the second prong of *Lemon* is satisfied.

C. No Excessive Entanglement

Again, the district court did not address this prong of the *Lemon* test. 728 F. Supp. at 71. Judge Bownes found excessive entanglement on the supposed grounds that the school district selects the person to pray and controls the content of the prayer. 908 F.2d at 1095. However, this conclusion lacks both factual and legal support. There is

no evidence that persons offering the prayer are chosen according to religious beliefs or anticipated content of their prayer. The guidelines for prayer do not specify content, they merely offer suggestions to make the prayer more doctrinally neutral. The actual content of the prayer is not reviewed or approved in advance. A similar school district policy was held not to create excessive entanglement in *Albright v. Board of Educ.*, *supra*, ____ F. Supp. at ____ . Even if the school district were to pre-screen proposed prayers to ensure neutral content, that would not constitute excessive entanglement. *Jones v. Clear Creek Independent Sch. Dist.*, *supra*, 930 F.2d at ____ (entanglement prong applies only to governmental and religious institutions). In short, graduation prayer creates no excessive government entanglement with religion.

In summary, graduation prayer withstands analysis under the *Lemon* test. In fact, to prohibit or censor graduation prayer would, itself, have the impermissible effects of "inhibiting" religion or of entangling government with religion. While graduation prayer may not be required, neither may it be proscribed. Between the two religion clauses of the First Amendment lies an area for accommodation of the spiritual traditions and values of society. See *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1987) (limits of permissible accommodation are not co-extensive with, and may exceed, mandates of Free Exercise Clause). In a pluralistic society, public speech will inevitably offend someone. School districts have a role in teaching students toleration of differing views, religious as well as cultural and political. Public officials are not required to filter public speech to protect against possible offense. Nor are public speakers required to tailor their comments to satisfy the sensibilities of the least religious among us. In short, in an open society which prides itself on free expression, there is no constitutional right to be free from offense in a public place. *Grossberg*, *supra*, at 290 ("The Court recognizes that some may be offended

by what is said [in graduation prayer], but it is not convinced that the Constitution protects individuals from this type of offense.").

CONCLUSION

Based on the foregoing, the Board of Education of Alpine School District strongly urges the Court to reverse the decision of the court of appeals.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT E. LEE, INDIVIDUALLY AND AS PRINCIPAL OF
NATHAN BISHOP MIDDLE SCHOOL, *et al.*,
Petitioners,

v.

DANIEL WEISMAN, ETC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF FOR
AMERICANS FOR RELIGIOUS LIBERTY
AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether government sponsorship of invitational prayers tends to degrade religion, and therefore violates the Establishment Clause.

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for the First Circuit**

**BRIEF FOR
AMERICANS FOR RELIGIOUS LIBERTY
AS AMICUS CURIAE IN SUPPORT OF RESPONDENT**

INTEREST OF THE AMICUS CURIAE *

Americans for Religious Liberty is a non-profit, non-denominational educational organization dedicated to preserving the American constitutional tradition of religious freedom. Its members and officers have been parties in numerous lawsuits challenging practices that implicate

* This brief is filed with the written consent of the parties, pursuant to Supreme Court Rule 37.

the Establishment Clause and it has appeared before this Court as an amicus curiae in several Establishment Clause cases, including most recently *Board of Education v. Mergens*, 110 S. Ct. 2356 (1990).

SUMMARY OF ARGUMENT

"[T]his Court has never relied on coercion alone as the touchstone of Establishment Clause analysis." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 628 (1989) (O'Connor, J., concurring). In *Everson v. Board of Education*, 330 U.S. 1 (1947), the case recognized as the beginning of this Court's modern Establishment Clause jurisprudence, the Court concluded that in addition to preventing government coercion, the clause also prohibits government from aiding religion in general, participating in religious activities and influencing a person with respect to his religious beliefs and practices. For over four decades after *Everson* this Court consistently and repeatedly affirmed that coercion is not a necessary element of any claim under the Establishment Clause. The most recent reaffirmation of this view came a mere two terms ago. *County of Allegheny, supra*, 492 U.S. at 597-98 n.47.

Besides respect for its own precedents, there are several other reasons why this Court should conclude that government coercion is not the only type of conduct prohibited by the Establishment Clause. To begin, "the purposes underlying the Establishment Clause go much further than that." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). The Founders wanted to guard religion from any threat to its integrity by preventing government from engaging in contentious endorsements of religious practices or institutions. As James Madison argued, such endorsements are impermissible because they imply "that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil Policy." Memorial and Remonstrance

Against Religious Assessments, para. 5 (1785). Moreover, if coercion is a necessary element of an Establishment Clause violation, then this clause adds nothing to the Free Exercise Clause. "It cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). Finally, employing coercion as the litmus test will not make Establishment Clause decisions any easier. The elasticity of the concept of coercion as it has been applied by federal courts and agencies reveals such hopes to be illusory. *E.g., Culombe v. Connecticut*, 367 U.S. 568, 601 (1961) (precise definition of coercion in context of criminal confessions "impossible"), *B & D Plastics, Inc.*, 302 N.L.R.B. No. 33 (March 29, 1991) (company-sponsored cookout coercive in context of approaching union representation election).

Once it is accepted that the Establishment Clause not only prohibits coercion, but also prohibits the state from compromising the integrity of religion, it is clear that the judgment of the court of appeals should be affirmed. In a religiously diverse society, the integrity of religion is compromised by having the government sponsor religious ceremonies, such as prayers at public school graduations. To avoid offense to religious minorities, the prayers must be scrutinized for their "inclusiveness." Judicial scrutiny of other government-sponsored religious ceremonies has resulted in ministers having to pledge to censor themselves. *Kurtz v. Baker*, 644 F. Supp. 613 (D.D.C. 1986). Court-approved generic prayers are demeaning to religion. The "complete separation between the state and religion is best for the state and best for religion." *Everson, supra*, 330 U.S. at 59 (Rutledge, J., dissenting).

ARGUMENT

I. COERCION IS NOT A NECESSARY ELEMENT OF AN ESTABLISHMENT CLAUSE VIOLATION

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court articulated a three-pronged standard for determining whether government action can be upheld in the face of an Establishment Clause challenge. As stated in *Lemon*, to pass muster under the Establishment Clause, a "statute must have a secular legislative purpose . . . its principal or primary effect must be one that neither advances nor inhibits religion . . . and the statute must not foster 'an excessive governmental entanglement with religion.'" *Id.* at 612-13. This teaching was not the product of a sudden revelation. Instead, the *Lemon* "test" was the result of a careful refinement of principles set forth in earlier cases, including the principle that the Establishment Clause forbids any sort of aid or support of religion (or irreligion) unless the aid or support is incidental to achievement of a legitimate secular end. *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963). Similarly, "subsequent decisions further have refined the [*Lemon*] definition of governmental action that unconstitutionally advances religion," so that government action that "has the purpose or effect of endorsing religion" has been recognized as impermissible. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592 (1989). See also *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982) (government action that provides "symbolic benefit" to religion is unconstitutional).

Petitioners wish to jettison *Lemon*.

Boldly reshaping this Court's precedents and the history surrounding the Establishment Clause, petitioners contend that the "First Amendment was designed by the Framers to protect only against [government coercion]." Petitioners' Brief at 14. Petitioners have mistaken a thread for the entire design. While prevention of gov-

ernment coercion is undoubtedly one of the principal purposes of the Establishment Clause, it is certainly not the only purpose, nor is coercion the only type of conduct prohibited by the Establishment Clause.

Despite petitioners' suggestion to the contrary, this Court has consistently recognized that coercion is not a necessary element of an Establishment Clause violation. *Everson v. Board of Education*, 330 U.S. 1 (1947), is regarded as the beginning of this Court's "modern Establishment Clause jurisprudence." *County of Allegheny, supra*, 492 U.S. at 656 (1989) (Kennedy, J., concurring in the judgment and dissenting in part). In *Everson*, this Court observed:

The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and *vice versa*.

Id. at 15-16. Thus, while *Everson* states the obvious, that coercion violates the Establishment Clause, it also states that coercion is but one of several types of constitutionally infirm conduct. The clause also prohibits government from aiding religion in general, sponsoring religious activities or ceremonies and influencing (in addition to coercing) a person with respect to his religious beliefs and practices.

Similarly, in *McGowan v. Maryland*, 366 U.S. 420 (1961), the Supreme Court noted that the Sunday closing laws at issue did not violate the Establishment Clause because, *inter alia*, they did not involve any "direct cooperation between state officials and religious ministers."

Id. at 452. While absence of government coercion of religious beliefs was an additional reason for upholding the laws, it clearly was not the only reason—again, contrary to what petitioners suggest. *Cf.* Petitioners' Brief at 34-35. Justice Frankfurter expanded on the Court's reasoning, pointing out that "the constitutional prohibition of religious establishment is a provision of more comprehensive availability than the guarantee of free exercise." *Id.* at 467 (Frankfurter, J., separate opinion). As a result:

The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. . . . Neither the National Government nor . . . a State may, *by any device*, support belief or the expression of belief for its own sake, whether from conviction of the truth of that belief, or from conviction that by the propagation of that belief the civil welfare of the State is served

Id. at 465-66 (emphasis added).

Of course, as petitioners concede, the Court in *Engel v. Vitale*, 370 U.S. 421, 430 (1962), unequivocally rejected the view that coercion is a necessary element of an Establishment Clause violation:

The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not.

And the view that government coercion is but one of the evils forestalled by the Establishment Clause, so that state support of religion that falls short of actual coercion of religious dissenters can constitute an Establishment Clause violation, has been repeatedly emphasized since

Engel. E.g., Wallace v. Jaffree, 472 U.S. 38, 60-61 (1985).

This brief review of rulings by this Court suffices to establish that "this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis." *County of Allegheny, supra*, 492 U.S. at 628 (O'Connor, J., concurring). Petitioners and their amici wish to effect a revolution in constitutional jurisprudence, and this is a goal that their highly selective treatment of this Court's decisions cannot mask. *See* Petitioners' Brief at 34-35; Brief for the United States at 19 n.18.

Petitioners and their amici also advance a similarly limited view of the history surrounding the adoption of the Establishment Clause. There is no need for a point-by-point rebuttal of their historical analysis.¹ Consider just one issue of historical interpretation: the significance of the Memorial and Remonstrance Against Religious Assessments written by James Madison. As the United States points out, this document has long been regarded as important for understanding the reasoning behind the Establishment Clause. Brief for the United States at 16-17. It is unfortunate, therefore, that petitioners and their amici narrowly focus on only one of the arguments in the Memorial and Remonstrance. No one will dispute that Madison and the other Founders who championed religious freedom were concerned with government coercion of religious minorities. However, to characterize the Memorial and Remonstrance as "a bill of particulars" against coercion, Petitioners' Brief at 21, is to provide a tendentious summary of its contents.

Even a cursory reading of the Memorial and Remonstrance reveals that Madison was concerned with much

¹ There is no need for a point-by-point rebuttal because, among other reasons, petitioners' underlying theory regarding the significance of contemporaneous historical events for understanding the Establishment Clause is misconceived. *See infra*, pp. 12-15.

more than the individual's freedom from coercion. Prominent among his concerns was the need to guard religion from any sort of threat to its integrity. Madison regarded the strict separation of Church and State as being necessary to maintain "the purity and efficacy of Religion." Memorial and Remonstrance, para. 7 (quoted in *Everson v. Board of Education*, 330 U.S. 1, 63-72 (1947) (Appendix to dissenting opinion of Justice Rutledge)). Support of religion by government is wrong because it would "weaken in those who profess this Religion a pious confidence in its innate excellence," as well as "foster[ing] in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits." *Id.*, para. 6. Endorsement of religious beliefs and practices, symbolic or otherwise, is impermissible because it would imply "that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil Policy." *Id.*, para. 5. These and other passages from the Memorial and Remonstrance demonstrate that Madison wanted to protect religious beliefs and practices from government influence of *any* sort. It is no surprise, therefore, that this Court and numerous scholars, after reviewing the Memorial and Remonstrance, have concluded that, although a purpose of the Establishment Clause is to protect religious minorities from coercion, "the purposes underlying the Establishment Clause go much further than that." *Engel*, 370 U.S. at 431. The Establishment Clause also serves to protect religion—even from well-intentioned, but officious, "accommodation" of religious practices—as "a union of government and religion tends . . . to degrade religion." *Id.* See Van Alstyne, *What Is "An Establishment of Religion?"*, 65 N.C.L. Rev. 909, 915 (1987) ("The state that appropriates the sacred (*i.e.*, Latin crosses, invocations . . .) disregards Madison's pleas for civil restraint"). See also G. Wills, *Under God: Religion and American Politics* 375-77 (1990); Conkle, *Towards a General Theory of the Establishment Clause*, 82 Nw. U.L.

Rev. 1113, 1181 (1988); Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 Colum. L. Rev. 1463, 1476 (1981); see also *Marsh v. Chambers*, 463 U.S. 783, 804 (1983) (Brennan, J., dissenting) (one purpose of Church-State separation "is to prevent the trivialization and degradation of religion").

Besides lacking support in this Court's precedents and in the history surrounding the Establishment Clause, petitioners' theory suffers from both logical and practical defects. Its logical defect is that "[t]o require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy." *County of Allegheny, supra*, 492 U.S. at 628 (O'Connor, J., concurring). See Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 922 (1986) ("If coercion is also an element of the establishment clause, establishment adds nothing to free exercise"). The Framers wrote two religion clauses into the first amendment; while the protections afforded by both clauses undoubtedly coincide to some extent, they cannot have the exact same meaning. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect").

With respect to practical defects, the coercion "test" favored by petitioners and their amici, although touted as a means for avoiding the alleged confusion caused by the Court's traditional Establishment Clause doctrine, would not be easy to apply. The United States suggests that the issue of coercion is relatively uncomplicated because it has been addressed in other constitutional contexts. Brief for the United States at 22-23. However, the Court has encountered substantial difficulty in resolving questions of coercion, even in the limited area of criminal confessions. As one legal scholar has noted, the Court has

"struggled . . . to define appropriate constitutional limitations on the interrogation methods used by police in light of the capacity of the individual possessed of free will to withstand coercion." S. Saltzburg, *American Criminal Procedure* 426 (1984). The Court has acknowledged that it must review "the totality of the circumstances" before reaching any conclusions on the voluntariness of a confession, e.g., *Fikes v. Alabama*, 352 U.S. 191, 197 (1957) and these circumstances are broadly defined to include such facts as the education of the accused, compare *Payne v. Arkansas*, 356 U.S. 560 (1958) (confession involuntary as accused had a fifth grade education) with *Crooker v. California*, 357 U.S. 433 (1958) (confession voluntary as accused was a first year law student), the skills of the interrogator, *Leyra v. Denno*, 347 U.S. 556 (1954), the fatigue of the accused, *Spano v. New York*, 360 U.S. 315 (1959), and the age of the accused, *Gallegos v. Colorado*, 370 U.S. 49 (1962).²

Culombe v. Connecticut, 367 U.S. 568 (1961) exhibits many of the frustrations felt by the Court in confronting the issue of coerced confessions. The opinion of the Court expressed the views of but two Justices; there were three concurring opinions and a dissent. Justice Frankfurter, writing for the Court, conceded that defining coercion presented "a recurring problem," *id.* at 569, and candidly stated "[i]t is impossible for this Court . . . to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed . . . in obtaining confessions." *Id.* at 601. In part,

² Curiously, although the United States makes reference to this Court's criminal confession cases as an example of application of the concept of coercion, the United States also states that "no special rule for children is justified" in the Establishment Clause context. Brief for the United States at 22-23 n.21, 27. Since age is indisputably relevant in assessing an individual's autonomy, a "special rule for children" would be required were coercion the key element in an Establishment Clause violation.

the problem derives from the imprecise concept of a voluntary action. As Justice Frankfurter explained:

The notion of 'voluntariness' is itself an amphibian. It purports at once to describe an internal psychic state and to characterize that state for legal purposes.

Id. at 604-05.

Furthermore, a glance at how the concept of coercion has been applied in fora other than this Court instantly reveals that the concept is much more elastic than petitioners and their amici suggest. For example, the National Labor Relations Board has concluded that an employer's cookout two days before a union representation election could coerce employees to vote for the employer, even though attendance at the cookout was voluntary. *B & D Plastics, Inc.*, 302 N.L.R.B. No. 33 (March 29, 1991).³

From the foregoing, it is readily apparent that assessing the coercive effect of state-sponsored religious ceremonies presents substantial difficulties. Using coercion as the Establishment Clause "test" will result in as many, if not more, claims of inconsistent adjudication and unprincipled results as use of the standard articulated in *Lemon* and refined by later decisions. "[I]t seems unlikely that 'coercion' identifies the line between permissible and impermissible religious displays any more brightly than does 'endorsement.'" *County of Allegheny, supra*, 492 U.S. at 650 n.6 (Stevens, J., concurring).

In short, petitioners' advocacy of coercion as a necessary element of an Establishment Clause violation lacks historical foundation, impugns more than four decades of this Court's decisions, renders the Establishment Clause

³ Defining "voluntary action" and "coercion" has proved no less troublesome outside the confines of the courtroom. Professional psychologists and philosophers differ widely in their understanding of these concepts. See, e.g., T. Beauchamp and R. Faden, *A History and Theory of Informed Consent* 338-39 (1986).

redundant and is unworkable. The Court should reject petitioners' argument—as it unequivocally rejected an identical argument a mere two terms ago. *County of Allegheny, supra*, 492 U.S. at 597-98 n.47.

II. THE GOVERNMENT'S USE OF RELIGION IN CEREMONIES DOES NOT ACCOMMODATE, BUT RATHER DEMEANS RELIGION

Petitioners and their amici rely heavily on the Founders' use of the powers of government to institute or support some religious ceremonies and practices as an argument for the constitutionality of the graduation prayers at issue here. They argue that this history shows that government may accommodate religion through non-coercive religious ceremonies and practices.

Petitioners' reliance on specific practices initiated or condoned by the Framers is misplaced. "Our use of the history of their time must limit itself to broad purposes, not specific practices." *Abington School District, supra*, 374 U.S. at 241 (Brennan, J., concurring). Scholars have concluded that the Framers of the Constitution desired the intent of the Constitution to govern, as evidenced by its language, but not their own particular intentions, that is how they applied the Constitution under the circumstances of their time. *E.g.*, Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985). The Court has at least tacitly accepted this argument because it has condemned practices accepted by the Framers of the Bill of Rights or of subsequent constitutional amendments. *E.g.*, An Act for the Punishment of Certain Crimes against the United States, § 16, 1 Stat. 116 (1790) (law enacted by First Congress providing for public whipping of some thieves); Act of July 23, 1866, 14 Stat. 216 (law, enacted one week after Congress proposed fourteenth amendment, providing for the racial segregation of District of Columbia schools).

The circumstances, in particular the religious circumstances, of our time are profoundly different from the time of the Founders. The Founders "knew differences chiefly among Protestant sects," whereas "[t]oday the Nation is far more heterogenous religiously, including as it does substantial minorities not only of Catholics and Jews, but as well of those who worship according to no version of the Bible and those who worship no God at all." *Abington School District, supra*, 374 U.S. at 240. Practices arguably consistent with the underlying values of the Establishment Clause during the time period of the Founders may not be consistent with those values today. They certainly cannot be justified by the rationale originally offered for their constitutionality.

In this regard, it is worthwhile examining the institution of the congressional chaplaincies in some detail. Petitioners and their amici place special emphasis on the institution of the chaplaincies and on this Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), which upheld the chaplaincies. However, the arguments given for the constitutionality of that institution during the early history of our country are not ones that petitioners would dare to advance today.

As stated above, the United States was much more religiously homogeneous during the country's early years than it is today. Because of the lack of religious diversity in this country at the time of the First Congress, some of the Framers understandably believed that their concern for maintaining the integrity of religion by avoiding contentious endorsements of religious practices and institutions would not necessarily be disserved as long as the government remained neutral among the sects (almost exclusively Protestant) then prevalent in the country. Some of the Framers, therefore, had no quarrel with congressional chaplaincies that fairly represented what diversity there was in religious viewpoints. It is noteworthy in this regard that the early congresses tried

to avoid any appearance of favoring one (Protestant) denomination over another by expressly providing, through concurrent resolutions, that the chaplains of the Senate and the House were to be of different denominations. 1 Journal of the Senate 12 (1789); 1 Journal of the House of Representatives 16 (1789).⁴

That the chaplaincies would be permissible as long as they maintained neutrality among Protestant or Christian sects was also the view of the House Judiciary Committee that in 1854 upheld the constitutionality of the congressional chaplaincies in the face of several petitions that requested that the practice be discontinued. The report of the House Judiciary Committee states:

At the time of the adoption of the constitution and the amendments, the universal sentiment was that Christianity should be encouraged—not any one sect. Any attempt to level and discard all religion, would have been viewed with universal indignation. The object was not to substitute Judaism or Mahomedanism, or infidelity, but to prevent rivalry among sects to the exclusion of others.

H.R. Rep. No. 124, 33d Cong., 1st Sess., at 6.⁵

Petitioners' narrow focus on practices accepted or instituted by the Framers is therefore clearly misguided

⁴ The resolutions did not expressly state that the chaplains were to be from Protestant denominations, but that was how the resolutions were understood. All the chaplains of the House and Senate have been Christian; in the early years, they were all Protestant. Office of the Senate Chaplain, Chaplains of the U.S. Senate, April 25, 1789 to Date; *History of the United States House of Representatives*, H.R. Doc. No. 250, 89th Cong., 1st Sess. 212 (1965). In 1845, when the possibility of a Mormon serving as a chaplain was raised (in jest), the proposal provoked ridicule and laughter. Cong. Globe, 29th Cong., 1st Sess. 40 (1845).

⁵ The same report observed that "[i]n this age, there can be no substitute for Christianity; that in its general principles, is the great conservative element on which we must rely for the purity and permanence of free institutions." *Id.* at 8.

and actually proves too much. Petitioners rely on these practices for the argument that non-coercive accommodation of religion is permissible. If they were truly faithful to the specific intentions of many of the Framers they would be contending—much to the consternation of Rabbi Gutterman, who gave the invocation at issue here—that the state may support religion as long as it is the Christian religion. As the nineteenth century legal scholar Joseph Story observed, many of the Framers believed “that Christianity ought to receive encouragement from the state” provided that the state’s support did not engender “rivalry among Christian sects.” 2 J. Story, *Commentaries on the Constitution of the United States* § 1874, p. 593 and § 1877, p. 594 (1851). There is also an unresolvable tension between the petitioners’ contention that the Establishment Clause forbids coercion and their contention that the state can accommodate religion through certain ceremonial practices or institutions such as the congressional chaplaincies, because the chaplaincies were (and are) undeniably coercive: they were (and are) supported by tax dollars. Indeed, the chaplains’ initial salary of five hundred dollars per year “compare[d] favorably with the Congressmen’s own salaries of \$6 for each day of attendance.” *Marsh*, 463 U.S. at 788 n.7. Petitioners cannot have it both ways. They cannot rely on those aspects of the Framers’ practices that are acceptable to contemporary sentiments while ignoring those aspects that are anachronistic.

Focusing on the congressional chaplaincies is useful for making another point. The state’s use of religion for ceremonial purposes degrades religion; it does not accommodate religion.

The use of cookie-cutter prayers is one symptom of “civil religion.” Government-sponsored invitational prayer is necessarily framed in the broadest and blandest possible terms, in an attempt to appeal to everyone. Petitioners unwittingly stumble upon the truth when they state, on Madison’s authority, that boredom resulted from

the congressional chaplains' tepid daily offerings in the House and Senate. Petitioners' Brief at 32 n.33 (Madison observed that the daily devotions had "degenerat[ed] into a scanty attendance, and a tiresome formality").

But while use of tepid generalities consistent with Christianity may have been sufficient in Madison's day to avoid offense, it is no longer sufficient. Now the chaplains' prayers must be judicially supervised to keep them out of trouble. As this Court "has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all," *Wallace, supra*, 472 U.S. at 53, the scope of the obligation of the government's chaplains not to give offense has extended to the irreligious. Thus, in *Kurtz v. Baker*, 644 F. Supp. 613 (D.D.C. 1986), a federal district court dismissed a lawsuit brought by a secular humanist complaining about the contents of the Senate Chaplain's prayers only after the Senate Chaplain apologized for any perceived disparagement of non-theists in his prayers and pledged to refrain from potentially offensive remarks in the future. With respect to the congressional chaplaincies at least, the courts have out of necessity entered into "the business of writing or sanctioning official prayers." *Engel, supra*, 370 U.S. at 421.

The congressional chaplaincies show that government support is a crutch that can cripple religion. Moreover, government support demeans religion, even if it is only a temporary alliance in the context of a "rite of passage." Brief for the United States at 24. Use of religion at the significant right of passage at issue in the instant case not only sends the unmistakable message that religion has the government's endorsement, but it also reduces religion to the status of the government's ceremonial prop. This use of religion as "an engine of Civil policy" results in "an unhallowed perversion" of religion. Memorial and Remonstrance, *supra*, para. 5. Use of

prayers at public school ceremonies subjects the priest, rabbi or minister to a scrutiny similar to that to which the congressional chaplains must submit. In the instant case for example, those offering prayers were to adhere to "Guidelines for Civil Occasions," that specify that graduation prayers must exhibit "inclusiveness." Toleration of others' beliefs is, of course, an important and essential virtue in our democracy, but this virtue is misapplied when government supervises the writing of prayers.

The government supervision necessary to ensure the "inclusiveness" of prayers in today's religiously diverse society threatens the independence and vitality of religion. Observers from De Tocqueville to the present have remarked on how the "complete separation of church and state" has invigorated religion in this country whereas the support of religion, through state ceremonies and other means, has weakened religious faith in many European countries. A. De Tocqueville, *Democracy in America* 295 (G. Lawrence trans., J. Mayer ed., 1969). See also G. Gallup, *Religion in America* 8 (1984) (Americans' "beliefs are intact, whereas a decline in beliefs has occurred in certain Western European nations"); Martin, *Revised Dogma and New Cult*, 111 *Daedalus* 53, 54-55 (1982) (vitality of religion is low in countries in which religion receives state support); M. Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* 11 (1965) (strength of religion in America derives not from "favoring acts of government, but, in largest measure, from the continuing force of the evangelical principle of separation"). Routinely incorporating generic prayers within state functions risks creating a sense of ennui with—if not disdain for—religious observances and beliefs. Prayers drained of vibrancy through government supervision will not inspire religious faith, whatever civil purpose they may serve. An attempt to be offensive to none results in a prayer meaningless for all. "Civil religion" is an oxymoron.

Equally appalling is the fate of those clergy who refuse to omit sectarian references from their prayers. They will not be called to provide “inclusive” invocations. A state blacklist of clergy who refuse to express their faith in what the state considers appropriate language is a chilling prospect. The Establishment Clause was designed to prevent government from making persons “speak only the religious thoughts that government want[s] them to speak and to pray only to the God that government want[s] them to pray to.” *Engel, supra*, 370 U.S. at 435.

The “complete separation between the state and religion is best for the state and best for religion.” *Everson, supra*, 330 U.S. at 59. This principle, articulated in Justice Rutledge’s dissent, has been recognized as expressing the sense of all nine Justices in *Everson, Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 210-11 (1948), and has been “consistently reaffirmed” by this Court. *Abington School District, supra*, 374 U.S. at 217. The Court should continue to apply this principle.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

**ROBERT E. LEE, INDIVIDUALLY AND AS PRINCIPAL OF
NATHAN BISHOP MIDDLE SCHOOL, ET AL.,**

Petitioners,

v.

DANIEL WEISMAN, ETC.,

Respondent.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

**BRIEF FOR NATIONAL PEARL
(NATIONAL EDUCATION ASSOCIATION, NATIONAL PTA,
ET AL.) AND THE NATIONAL ASSOCIATION OF
ELEMENTARY SCHOOL PRINCIPALS AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS**

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American Association of School Administrators
American Association of University Women
American Humanist Association
Central Conference of American Rabbis
Committee for Public Education and Religious Liberty*
Council for Democratic and Secular Humanism
Michigan Council about Parochialism
Monroe County, NY PEARL
National Center for Science Education, Inc.
National PTA
National Council of Jewish Women
National Education Association
National Service Conference of the American Ethical Union
Ohio PEARL
Public Funds for Public Schools of New Jersey
Union of American Hebrew Congregations
Unitarian Universalist Association of Congregations

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MISCELLANEOUS		
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T. Coxe, "An Examination of the Constitution," (1787), reprinted in 3 <i>The Founders' Constitution</i> (P. Kurland and R. Lerner eds. 1987).....	5	
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1 <i>Annals of Congress</i> (J. Gales ed. 1834)	6, 19	
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		13, 14, 21
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<i>Messages and Papers of the Presidents</i> (J. Richardson ed. 1901)	9	

<i>The Bill of Rights: A Documentary History</i> (B. Schwartz ed. 1971)	12
A. Stokes, <i>Church and State in the United States</i> (1950)	11
S. Tucker, "A Dissertation on Slavery" in <i>Blackstone's</i> <i>Commentaries</i> (S. Tucker, ed. 1803)	5, 6
Wechsler, <i>Toward Neutral Principles of Constitutional</i> <i>Law</i> , 73 Harv. L. Rev. (1959)	18
M. Williams, <i>The Shadow of the Pope</i> (1932)	11, 15
G. Wood, <i>The Creation of the American Republic</i> (1969)	6

INTEREST OF THE AMICI CURIAE

The National Coalition for Public Education and Religious Liberty ("National PEARL") comprises organizations sharing the objectives of preserving religious freedom and separation of church and state in education. The National Association of Elementary School Principals is a voluntary professional organization of more than 25,000 elementary and middle school principals. Its members are responsible for the education of approximately 25 million students.

SUMMARY OF THE ARGUMENT

Ignoring the warning that ours is a "government of laws, and not of men," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), the Solicitor General and Petitioners ask this Court to interpret the Establishment Clause as having endorsed the *practices* of the Founders' generation. Not only is such an approach to constitutional interpretation inconsistent with the Founders' intent, its proposed application to this case relies on selectively chosen examples that cannot be reconciled with principled constitutional adjudication.

Compounding these methodological errors, Petitioners and the Solicitor General then ask this Court to interpret the Establishment Clause as forbidding only state "coercion," a term they never define. They assert that coercion -- the most *flagrant* form of religious persecution -- should be the *only* possible violation of the Establishment Clause. History, upon which Petitioners and the Solicitor General professedly rely, does not support this peculiar interpretation of the Establishment Clause.

This Court should, consistently with all of its prior decisions, affirm the lower courts and strike down religious exercises sponsored by public schools.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE SHOULD BE INTERPRETED BY REFERENCE TO CONSTITUTIONAL PRINCIPLES, NOT TO SELECTED HISTORICAL PRACTICES.

A. The Founders Believed that the Constitution Should Be Interpreted by Reference to Principles and Not By Reference to Practices.

In arguing that constitutional *rights* should be interpreted in light of the *practices* of the Founders' generation,¹ Petitioners and the Solicitor General ask this Court to resuscitate the same discredited method of constitutional interpretation that was employed in the *Dred Scott* decision to legitimize human slavery.² Such a method of interpretation is justified neither by history nor by logic.

Writing for the Court in *Dred Scott*, Chief Justice Taney dismissed the argument that Blacks were included within the phrase "all men are created equal" *because*

¹See, e.g., Brief for the United States as Amicus Curiae (hereinafter "SG Br.") at 7 ("A proper theory of the Establishment Clause must therefore embrace the validity of this practice [of devotional exercises] and its modern counterparts rather than treating them as anomalies"). Similarly, from the premise that "[t]he Founders encouraged civic recognition of the Nation's religious heritage," it is concluded that such practices "therefore did not implicate the prohibition embodied in the Establishment Clause." *Id.* at 9. See also *id.* at 18-19. Brief for Petitioners (hereinafter "Pet. Br.") at 26-30 (setting out "The Conduct of the Founders"); *id.* at 31 ("this conduct of the Founders reflected their intentions concerning the Establishment Clause . . .").

²*Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

if the language, as understood in that day, would embrace them, the *conduct* of the distinguished men who framed the Declaration of Independence *would have been utterly and flagrantly inconsistent with the principles they asserted.*

Scott v. Sanford, 60 U.S. at 410 (emphasis added). Finding it inconceivable that the men who founded our nation could have acted inconsistently with their own principles, the *Dred Scott* Court looked to the conduct of the Founders' generation to divine the meaning of the law.

[T]he men who framed this declaration were great men -- high in literary acquirements -- high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting.

Id. Thus, in the curious reasoning of the *Dred Scott* decision, "negroes" are not "men" within the phrase "all men are created equal" *because* the "great men" who ratified that phrase were slaveholders. For the *Dred Scott* Court it was easier to deny the humanity of Blacks than to contemplate the possibility that the Founders failed to adhere to their own principles.

The briefs of Petitioners and the Solicitor General now adopt the *Dred Scott* interpretive methodology -- interpreting fundamental law by reference to the Founders' practices -- to justify state-sponsored devotional activities at public schools. They do not envision the possibility that the actions of the Founders could have been inconsistent with the principles of the

Constitution.³ But they do not offer *any* evidence that *any* Founder believed that the Constitution should be interpreted by looking to the conduct of the Founders' generation.

The Founders fully recognized that conduct was an unreliable measure of principle. John Jay, the first Chief Justice of the United States and co-author of the *Federalist*, candidly admitted the shortfalls of his contemporaries' conduct. Writing in the month that the Constitution was ratified, Jay acknowledged that many of the principles of his generation were "more generally admitted in theory than observed in practice."⁴ Jay believed, for example, that slavery was a violation of the fundamental law of his country and of the rights of his fellow human beings. Writing in 1819, Jay admitted that slavery was "discordan[t] with the principles of the Revolution; and [was] repugnant to the . . . Declaration of Independence. . . ."⁵ Chief Justice Jay observed that his contemporaries acted inconsistently with these fundamental principles:

That Men should pray and fight for their own
Freedom and yet keep others in Slavery is

³The Solicitor General declares that it would be "modern-day arrogance in the extreme" to suggest that there may have been a disparity between the Founders' conduct and their political principles. SG Br. at 12. As will be shown below, the Founders themselves recognized the difference between their own principles and practices. Thus it becomes modern-day naivete in the extreme to believe that there could not have been a disparity between the Founders' principles and their practices.

⁴Letter from John Jay to the English Antislavery Society (June 1788), reprinted in 3 *The Correspondence and Public Papers of John Jay* 340 (H. Johnston ed. 1890-93).

⁵Letter from John Jay to Elias Boudinot (Nov. 17, 1819), reprinted in 4 *id.* at 431.

certainly acting a very inconsistent as well as unjust and perhaps impious part, but the History of Mankind is filled with Instances of human Improprieties.⁶

Thus what Chief Justice Jay labeled the Founders' "improprieties," modern-day litigators euphemistically describe as the Founders' "practices."⁷

⁶Letter from John Jay to Richard Price (Sept. 27, 1785), reprinted in 3 *id.* at 168.

⁷During the Constitutional Convention in Philadelphia, delegates similarly were made aware of the inconsistency between the principles of the Declaration of Independence and the Constitution's deference to the practice of slaveholding. Gouverneur Morris, a firm supporter of the Constitution, told his fellow delegates that slavery was "a nefarious institution," a "curse of heaven," and a "sacrifice of every principle of right, of every impulse of humanity." Slavery existed only "in defiance of the most sacred laws of humanity." 2 *The Records of the Federal Constitutional Convention* 221-222 (M. Farrand ed. 1966).

Tench Coxe, a fervent supporter of the Constitution, criticized the Article I Section 9 slave import clause because it was "inconsistent with the dispositions and the duties of the people of America." Coxe, *An Examination of the Constitution* (1787), reprinted in 3 *The Founders' Constitution* 282 (P. Kurland and R. Lerner eds. 1987). Timothy Pickering viewed slavery as a "glaring [] inconsistency" with the principles of the Declaration of Independence. Letter from Timothy Pickering to Rufus King (Mar. 6, 1785), reprinted in 1 *id.* at 537.

One of America's first constitutional scholars, St. George Tucker, found it unconscionable that his country could "tolerate a practice incompatible" with equality, such toleration being "evidence of the weakness and inconsistency of human nature" S. Tucker, "A Dissertation on Slavery," in 2 *Blackstone's Commentaries* App. 31-32 (S. Tucker ed. 1803). He believed that a "state of slavery" was "perfectly irreconcilable" with the "principles of a democracy, which form the *basis and foundation* of our

Slavery is but one conspicuous example that reveals the inappropriateness of looking to eighteenth century practices to guide the interpretation of American fundamental law. The Founders frequently criticized the states for violating their own bills of rights. "In Virginia," Madison declared, "I have seen the bill of rights violated in every instance where it has been opposed to a popular current."⁸

Madison explicitly repudiated interpreting the Establishment Clause consistently with the practices of his generation. In rejecting chaplainships, he argued from principle, not practice. "The object of this establishment [of chaplains] is seducing; the motive to it is laudable. But is it not safer to adhere to a right p[r]inciple" J. Madison, *Madison's*

government." *Id.* at 43 (emphasis in original).

Luther Martin, the Antifederalist Attorney General of Maryland, similarly condemned inconsistencies between Americans' principles and practices. "[S]lavery is inconsistent with the genius of republicanism, and has a tendency to destroy those principles on which it is supported, as it lessens the sense of the equal rights of mankind" Martin, "Genuine Information," in 15 *The Documentary History of the Ratification* 433 (J. Kaminski ed. 1984) (emphasis in original).

⁸11 *The Papers of James Madison* 297-98 (R. Rutland ed. 1977). Elbridge Gerry, the conservative Antifederalist from Massachusetts, acknowledged that his own state had "abused" the right to assemble that was guaranteed in the Constitution of 1780. 1 *Annals of Cong.* 732 (J. Gales ed. 1834). Aedanus Burke condemned the actions of the South Carolina legislature that were so "irregular" that "the very name of a democracy, or government of the people, now begins to be hateful and offensive." A. Burke, *Considerations on the Society or Order of the Cincinnati* 13 (1783). Although Georgia's Constitution of 1777 established procedures for amendments, the state legislature repeatedly ignored them during the 1780s. G. Wood, *The Creation of the American Republic* 274 (1969).

'*Detached Memoranda*,' 3 Wm. & Mary Q. 532, 559 (E. Fleet ed. 1948).

Thomas Jefferson similarly rejected the argument that the quasi-religious practices of the administration of President Washington were relevant for determining their constitutionality. Addressing a question similar to that now pending before this Court -- the constitutionality of state-endorsed prayers -- President Jefferson rejected Washington's example. Although "aware that the practice of my predecessors may be quoted,"⁹ Jefferson rejected that precedent. "[C]ivil powers alone have been given to the President of the United States, [who possesses] no authority to direct the religious exercises of his constituents."¹⁰ The Founders themselves thus rejected the very method of constitutional interpretation that the Solicitor General and Petitioners now advance in their name.

B. Petitioners and the Solicitor General Distort History and Provide No Principled Basis for Their Selection of Particular Historical Examples.

1. Petitioners and The Solicitor General Misconstrue the Founders' Practices.

The briefs of the Solicitor General and Petitioners exemplify the adage that law office history spawns neither good history nor good law.

⁹Letter from Thomas Jefferson to Rev. Mr. Millar (Jan. 23, 1808), reprinted in 5 *The Writings of Thomas Jefferson* 237 (H. Washington ed. 1853).

¹⁰*Id.* at 237-238.

The Oath Clause. In an effort to locate an endorsement of official religious exercises in the Constitution, the Solicitor General pinpoints the Oath Clause.¹¹ His brief describes the oath as a "devotional exercise[]," SG Br. at 7, that is "an inherently religious act," *id.*, constituting "a religious duty." *Id.* at 13.

This attempt to transform a constitutional oath into a "religious duty" of officeholders ignores the express language of the Religious Test Clause: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." See *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961). The Solicitor General thus offers the constitutional *prohibition* against a religious activity as if it were a constitutional *promotion* of just such an activity.¹²

Official prayers. Petitioners and the Solicitor General observe that during the Founders' generation official prayers were

¹¹ The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S. Const. art. VI.

¹²The Solicitor General did not cite, for understandable reasons, the only two recorded comments about the Oath Clause made at the Constitutional Convention. "Mr. [James] Wilson said he was never fond of oaths, considering them as a left handed security only" Farrand, *supra* note 7, at 87. Representative Gorham of Massachusetts thought the "oath could only require fidelity to the existing Constitution." *Id.* at 88 (emphasis added). Neither recorded comment even remotely supports the Solicitor General's novel interpretation.

promoted by some of the early presidents, by John Jay, and by the legislature. But Petitioners and the Solicitor General apparently assume that simply because some official prayers were sanctioned in the eighteenth century, no further inquiry into the constitutionality of such prayers is necessary. Such an assumption ignores the controversy that such prayers generated and fails to account for inconsistent practices.

Jefferson and Madison -- whom petitioners themselves recommend as "the architects of our principles of religious liberty"¹³ -- believed that official prayers were unconstitutional. In refusing to proclaim the setting aside of days of thanksgiving and prayer, President Jefferson cited the Establishment Clause and declared that "no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government."¹⁴

During the first three years of his own presidency, Madison continued Jefferson's practice of refusing to call for days of thanksgiving and prayer. Madison reversed his practice at the onset of the War of 1812, but ceased it as soon as the war ended.¹⁵

¹³Pet. Br. at 14.

¹⁴Letter to Rev. Mr. Millar, *supra* note 9, at 236-37.

¹⁵Between July 1812, and March 1815, Madison issued four proclamations urging public thanksgiving to God. 1 *Messages and Papers of the Presidents* 513-561 (J. Richardson ed. 1901). Needless to say, a nation's wartime practices are not good sources for a deeper understanding of our civil liberties. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (the "military urgency of the situation demanded that all citizens of Japanese ancestry be segregated").

After retiring from the political pressures of the war and of public office, Madison decided that his own actions as president had violated the Establishment Clause. Referring to presidential encouragement of prayer, Madison declared that

The practice if not strictly guarded [against] naturally terminates in a conformity to the creed of the majority and a single sect, if amounting to a majority.

Detached Memoranda, supra, at 561. Thus for Madison the practice of encouraging public prayers was not a respected precedent, but a Pandora's box that should be kept tightly shut. As Madison foresaw, the practice did not lead to tolerance generally, but to the shoring up of the beliefs of the majority. Madison similarly argued that the "establishment of the chaplainship to Cong[re]ss is a palpable violation of equal rights, as well as Constitutional principles." *Id.* at 558. Madison thus rejected inferring any constitutional precedent from this early practice of Congress.

Petitioners assert that it is "noteworthy" that Chief Justice Jay held courtroom prayers while riding circuit in the 1790s. Pet. Br. at 29. The Solicitor General also observes that, under Jay's tutelage, "clergymen delivered prayers during circuit court on a regular basis" SG Br. at 11-12.

The Solicitor General and Petitioners could scarcely have selected a worse precedent to invoke than Jay's promotion of courtroom prayers. Despite his many admirable services to his country, Jay is not the person to whom we should turn to understand our religious liberties. Jay's religious intolerance was notorious. He sponsored the provision in the New York constitution that discriminated against Catholics by forbidding citizenship to immigrants who would not "abjure and renounce all

allegiance" to foreign ecclesiastical authority; *i.e.*, the Pope.¹⁶ Jay took an active role in promoting other forms of discrimination against Catholics.¹⁷

¹⁶N.Y. Const. of 1777, art. XLII. See M. Williams, *The Shadow of the Pope* 43-44 (1932).

¹⁷Referring to John Jay's "deep-seated anti-Catholic prejudice," one historian reminds us that

Jay persuaded the [New York Constitutional] Convention to bar ministers and priests from holding civil or military office and to withhold naturalization from persons who would not renounce 'all allegiance' to 'every foreign king, prince, potentate, and state, in all matters, ecclesiastical as well as civil.'

R. Morris, *John Jay: The Making of a Revolutionary* 15 (R. Morris ed. 1975). In New York Jay attempted, unsuccessfully, to deny Catholics all political rights, including the right to vote, unless they would "renounce and believe to be false and wicked the dangerous and damnable doctrine that the pope, or any earthly authority, has power to absolve men from sins" 1 A. Stokes, *Church and State in the United States* 405 (1950) (quoting Jay).

Unfortunately, Jay's anti-Catholicism was widely shared at the time of the founding.

That vociferous propagandist, Sam Adams, assailed popery as 'the greatest of the evils to be feared by his fellow subjects.' In the campaign against the Quebec Act, John Adams recommended the use of the pulpit to strengthen feeling against the Catholics. Hamilton feared that an Inquisition might be erected in Canada. The Lees [of Virginia], Silas Deane, Drayton, Patrick Henry, were all suspicious of 'popery.' Except Franklin, Jefferson, and Washington, few of the colonial leaders failed to denounce Catholics more or less strongly at one time or another. The press was uniformly hostile.

Jay's insensitivity to religious liberty was underscored by his use of courtroom prayers. Jay announced his intention to follow the "custom in New England" of having a clergyman attend court, and Jay thereupon adopted the Massachusetts practice of beginning court with a prayer by a Protestant clergyman.¹⁸

But in adopting the Massachusetts custom, Jay chose to emulate the practice of a state that maintained an official establishment of religion until 1833 and did not ratify the Bill of Rights until 1939.¹⁹ Moreover, the practice of offering prayers apparently was adopted in only three states, thus making it the *minority* practice under the early Republic.²⁰

Essentially, therefore, the Solicitor General is asking that the Establishment Clause be interpreted by reference to:

- a practice promulgated by a person who opposed religious liberty for Catholics;

J. McSorley, *An Outline History of the Church by Centuries* 729 (1961).

¹⁸Letter from John Jay to Richard Law (Mar. 19, 1790), reprinted in 2 *Documentary History of the Supreme Court of the United States: The Justices on Circuit, 1789-1800*, at 13-14 (M. Marcus ed. 1988). With only two exceptions, all of the prayers were offered by Congregationalists. See *id.* at 60, 106, 192, 317, 331, 412, 430 (Congregationalist prayers); *id.* at 105 (Baptist prayer); *id.* at 276 (Episcopalian prayer).

¹⁹See 2 W. McLoughlin, *New England Dissent 1230-1244* (1971); 2 *The Bill of Rights: A Documentary History* 1172 (B. Schwartz ed. 1971).

²⁰These three States were Massachusetts, see M. Marcus, *supra* note 18, at 60, 105, 106, 165, 232, 276, 317, 406, 496; New Hampshire, see *id.* at 192; and Rhode Island, see *id.* at 331, 412, 430, 475.

- the eighteenth century "custom" of a state that maintained an official establishment of religion;
- the eighteenth century "custom" of a state that had not ratified the First Amendment;
- a minority practice of the Circuit Courts that was followed in only three states; and
- a practice that *de facto* permitted only selected Protestant clergy to offer prayers in court.

2. Petitioners and the Solicitor General Ignore the Objectionable Church-State Practices of the Founders' Generation.

Many practices of the Founders' generation respecting religion, particularly those of the states, would be deeply objectionable if practiced today.²¹

²¹In an understandable effort to distance themselves from state practices during the early Republic, some Justices of this Court have suggested that the practices of the state governments (as opposed to the federal government) can be ignored because state governments were not originally "subject to the constraints of the Establishment Clause." *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573, 670 n.7 (1989) (Kennedy, J. dissenting). Such a suggestion is unsound for several reasons:

First, it is inconsistent with well-established precedent in this Court. Virginia's enactment of the Bill for Religious Liberty was, for example, held to be "particularly relevant in the search for the First Amendment's meaning." *McGowan v. Maryland*, 366 U.S. 420, 437 (1961).

Second, it is at odds with the expressed view of President Jefferson when he analyzed the constitutionality of official prayers. Jefferson rejected the precedent of Washington's use of prayer, arguing that his predecessor had, "without due examination," wrongly followed "the example of State executives" Letter to Rev. Mr. Millar, *supra* note 9, at 237 (emphasis

Several states restricted office-holding or the franchise to those who professed allegiance to Christianity or to Protestantism. South Carolina's constitution of 1778 allowed only members of the "Protestant religion" to be candidates for state offices and restricted the franchise to "every free white man . . . who acknowledges the being of a God, and believes in a future state of rewards and punishments" ²² Four other states restricted office-holding to Protestants. ²³ Only modestly

added). Similarly, John Jay sought to have the circuit he rode adopt the devotional practices of the state courts in which it was sitting. Letter to Richard Law, *supra* note 18, at 13.

Third, it ignores the political realities of the Republic's early years. Ten states restricted office-holding to Christians (and some states restricted office-holding to Protestants). See discussion *infra*. Given that national political leaders emerged from states that imposed religious requirements on office-holders and sometimes on voters, it was virtually inevitable that the electoral process would produce persons who took for granted official blessings for their religion.

²² S.C. Const. of 1778, arts. III, XII, XIII.

²³ Georgia restricted the franchise to members of the "Protest[a]nt religion." Ga. Const. of 1777, art. VI. A similar provision was contained in Georgia's Constitution of 1789. Ga. Const. of 1789, art. I, § 18. Vermont required members of its House of Representatives to declare their belief

in one God, the Creator and Governor of the Universe, the rewarder of the good and punisher of the wicked. And [to] acknowledge the scriptures of the Old and New Testament to be given by divine inspiration; and own and profess the Protestant religion.

Vt. Const. of 1786, ch. II, § XII. New Hampshire's constitution provided that "no person shall be capable of being elected a senator, who is not of the protestant religion." N.H. Const. of 1784, Part II, Senate. The same "protestant" requirement applied to Members of the New Hampshire House,

more tolerant, other states restricted office holding to Christians. ²⁴

Several states explicitly limited their guarantees of religious rights to Christians or to Protestants. Many of the states whose constitutions contained clauses designed to ensure religious liberty nevertheless guaranteed that liberty only to Protestants or to Christians. The "religious liberty" clause in the Maryland constitution of 1776 protected only "persons []

id., and to the state's chief executive officer. *Id.* New Hampshire did not remove these restrictions until 1877. M. Williams, *supra* note 16, at 48. New Jersey restricted office-holding to members of "any Protestant sect." N.J. Const. of 1776, art. XIX. This provision was retained until a new constitution was adopted in 1844. North Carolina forbade office-holding to any who would "deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments" N.C. Const. of 1776, art. XXXII. This article was not removed from the constitution until 1835. M. Williams, *supra* note 16, at 46.

²⁴ Delaware required state office-holders to "profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; [and in] the holy scriptures of the Old and New Testament to be given by divine inspiration." Del. Const. of 1776, art. 22. Maryland restricted the privilege of holding state offices to those who declared their "belief in the Christian religion." Md. Const. of 1776, A Declaration of Rights, &c., art. XXX; *id.*, The Constitution, art. LV. Massachusetts required office-holders to declare: "I believe the Christian religion, and have a firm persuasion of its truth" Mass. Const. of 1780, Part the Second, ch. 6, art. I. The Pennsylvania constitution of 1776 required the state's legislators to declare that they "do believe in one god, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked [and that they] do acknowledge the Scriptures of the Old and new Testament to be given by Divine inspiration." Penn. Const. of 1776, § 10. Pennsylvania's constitution of 1790 restricted officeholding to those "who acknowledge[] the being of a God and a future state of rewards and punishments" Penn. Const. of 1790, § 4.

professing the Christian religion."²⁵ Other states followed suit.²⁶

Three states sanctioned taxation for the support of churches. The Maryland legislature was specifically empowered by the state's 1776 constitution to "lay a general and equal tax, for the support of the Christian religion"²⁷ The Massachusetts constitution of 1780, in a provision that was not removed until 1833, empowered local communities to tax citizens for the support of the majority religion.²⁸ New Hampshire's 1784 constitution permitted taxation "for the support and maintenance of public protestant teachers of piety, religion and morality."²⁹

²⁵Md. Const. of 1776, A Declaration of Rights, &c., art. XXXIII.

²⁶Both Massachusetts and New Hampshire limited their constitutional protections to "every denomination of Christians" Mass. Const. of 1780, Part the First, art. III; N.H. Const. of 1784, Part I, art. VI. This restriction was retained in New Hampshire's constitution of 1792. N.H. Const. of 1792, Part First, art. VI. The New Jersey constitution provided that "no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right." N.J. Const. of 1776, art. XIX. This provision was retained until a new constitution was adopted in 1844. In 1778, South Carolina limited its "equal religious and civil privileges" to "Christian Protestants." S.C. Const. of 1778, art. XXXVIII.

²⁷Md. Const. of 1776, A Declaration of Rights, &c., art. XXXIII (emphasis added).

²⁸Mass. Const. of 1780, Part the First, art. III.

²⁹N.H. Const. of 1784, Part I, art. VI. New Hampshire's new constitution of 1792 retained the provision allowing taxation for the support of the majority religion. N.H. Const. of 1792, Part First, art. VI.

Five states forbade the clergy from holding public office.

In an eighteenth century practice that this Court recently declared, without dissent, to be unconstitutional, the states of Delaware, Georgia, New York, North Carolina, and South Carolina prohibited the clergy from holding state offices.³⁰ See *McDaniel v. Paty*, 435 U.S. 618, 629 (1978) ("however widely that view may have been held in the 18th century . . . including by enlightened statesmen" the practice is not acceptable today).

3. Petitioners and the Solicitor General offer no principled basis for selecting among historical practices.

Although Petitioners and the Solicitor General argue that the Constitution should be interpreted in light of the practices of the Founders, they offer no principled basis for distinguishing among the Founders' varying practices. They do not, of course, propose that we should follow Jefferson's refusal to promulgate days of thanksgiving and prayer. As Professor Wechsler observed, "the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."

³⁰The Delaware constitution of 1776 prohibited any "clergyman or preacher of the gospel, of any denomination [from] holding any civil office in this State" Del. Const. of 1776, art. 29. The Georgia constitution of 1777 provided: "No clergyman of any denomination shall be allowed a seat in the legislature." Ga. Const. of 1777, art. LXII. Similarly, the Georgia constitution of 1789 provided: "No clergyman of any denomination shall be a member of the general assembly." Ga. Const. of 1789, art. I, § 18. The New York constitution of 1777 prohibited "ministers of the gospel" from holding "civil or military office." N.Y. Const. of 1777, art. XXXIX. See also N.C. Const. of 1776, Art. XXXI; S.C. Const. of 1778, Art. XXI. South Carolina continued its prohibition in its constitution of 1790. S.C. Const. of 1790, art. I, § 23.

Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 15 (1959).

Petitioners and the Solicitor General offer this Court no principled method of constitutional adjudication. They simply cite those practices that they believe foreshadowed the practice that they wish to see continued, and ignore those practices that are inconsistent with -- or embarrassing to -- their preferred outcome.

II. THE PROPOSED "COERCION TEST" IS AN IMPROPER STANDARD FOR INTERPRETING THE ESTABLISHMENT CLAUSE.

The Solicitor General and Petitioners urge the Court to use this case as an "opportunity to replace the *Lemon* test" and to adopt a minimal standard that will merely preclude the government from "coerc[ing] participation in religious activities." SG Br. at 6, 7.³¹

A. Religious Coercion Was the Most Flagrant Harm Prohibited by the Establishment Clause, Not the *Exclusive* Harm.

In the congressional debates on the Establishment Clause, Daniel Carroll, a Catholic representative from Maryland, repudiated a minimalist "coercion" standard:

³¹Both the Solicitor General and Petitioners also would preclude the government from establishing an official religion. SG Br. at 7, 19; Pet. Br. at 24. No one, of course, advocates the establishment of an official religion, which suggests that this "second prong" is nugatory.

[T]he rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of [the] governmental hand.³²

The Solicitor General seeks to transform the right that ought to be treated with "the gentlest touch" into one deserving of no protection greater than results from a prohibition against coercion. Thus he would reduce this right of "peculiar delicacy" to one that he himself compares to the rights of suspected felons undergoing police interrogation. See SG Br. at 22 n.21 (citing *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991) and *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973)). No member of the First Congress proposed that coercion should be the standard. No member of Congress challenged Carroll's poignant reminder of the delicacy of these rights.

1. Madison and Jefferson did not believe that coercion was a necessary element of an Establishment Clause violation.

The Solicitor General and Petitioners purport to derive their understanding of the "Founders' intent" by looking to the words of Jefferson and Madison. See, e.g., SG Br. at 16, 18; Pet. Br. at 14. Although Petitioners correctly observe that "Madison and Jefferson were 'the architects of our principles of religious liberty,'" Pet. Br. at 14, and that during the First Congress debates on the Establishment Clause, Madison "played the leading role," Pet. Br. at 23, they wrongly infer that Madison and Jefferson believed that "government coercion of religious

³²1 *Annals of Cong.*, *supra* note 8, at 730. The version of the Establishment Clause to which Carroll referred read: "no religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.*

conformity is a *necessary element* of an Establishment Clause violation." Pet. Br. at 14 (emphasis added).

Although Petitioners and the Solicitor General suggest that Madison believed that "coercion" was a necessary component of an establishment of religion, they were unable to quote any such statement to that effect. The reason for this resounding silence is obvious: Madison knew that governmental acts falling far short of "coercion" could create impermissible establishments. For Madison, "[r]eligion is wholly exempt from [the] cognizance [of government]." 8 *The Papers of James Madison*, *supra* note 8, at 300. See also, *id.* at 301 ("Religion be not within the cognizance of Civil Government"). Madison repudiated any notion that the "Civil Magistrate [is a] Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy." *Id.* It was not simply coercion, but the "danger of a direct mixture of Religion & civil Government" that needed to be avoided. *Detached Memoranda*, *supra*, at 556.

Madison also repeatedly warned against practices that might lead to impermissible actions. "[I]t is proper to take alarm at the first experiment on our liberties" and to look to "the consequences in the principle." 8 *The Papers of James Madison*, *supra* note 8, at 300. Madison reminded Americans that it was not just the ultimate harm that needed to be guarded against, but the incremental steps leading to that harm as well.³³

³³ The people of the U[nited] S[tates] owe their Independence & their liberty, to the wisdom of descrying in the minute tax of 3 pence on tea, the magnitude of the evil comprized in the precedent. Let them exert the same wisdom in watching ag[ain]st every evil lurking under plausible disguises, and growing up from small beginnings.

Detached Memoranda, *supra*, at 557-58.

Petitioners and the Solicitor General also err in suggesting that Jefferson also believed that coercion was a necessary component of an establishment of religion. Pet. Br. 33; SG Br. at 7, 18. To the contrary, Jefferson believed that the Establishment Clause was violated even when government "indirectly" recommends that prayers be offered. The President rejected a constituent's suggestion that he

should *recommend*, not prescribe a day of fasting and prayer. That is, that I should *indirectly* assume to the United States an authority over religious exercises, which the Constitution has directly precluded them from.

Letter to Rev. Mr. Millar, *supra* note 9, at 237.

Far from believing that the Establishment Clause merely prohibited coercion, Jefferson believed that it would be unconstitutional for him even to "*recommend*" the offering of prayers. The reason, Jefferson asserted, was that the practice divides the citizenry and diminishes the status of the minorities.

It must be meant, too, that this recommendation is to carry some authority, and to be sanctioned by some penalty on those who disregard it; not indeed of fine and imprisonment, but of some degree of proscription, perhaps in public opinion.

Id. (emphasis added). The harm resulting from official prayers was not merely the possible coercion of fines and imprisonments, but the humiliation of dissenters in the eyes of public opinion. The degree of force was not the relevant standard for determining constitutionality.

Madison and Jefferson never said that coercion was the *only* wrong prohibited by the Establishment Clause. The suggestions of the Solicitor General and Petitioners to the contrary are utterly inconsistent with the beliefs of these Founders.

2. The proffered "coercion test" ignores the plain language of the Establishment Clause.

Although the Solicitor General professes to adhere to the "plain meaning" of the constitutional text, SG Br. at 15, in reality he is asking this Court to re-write the Establishment Clause. He seeks to transform the constitutional requirement that there be "no law respecting an establishment of religion" into a new formulation providing that "any law respecting an establishment of religion is permissible provided that it does not coerce."³⁴ Such a reformulation of the Establishment Clause would essentially strike the term "*no law respecting*" and replace it with "coercion."

The Establishment Clause, however, does not merely prohibit an establishment of religion. Madison believed that "[t]he Constitution of the U.S. forbids *everything like an establishment of a national religion*." *Detached Memoranda*, *supra*, at 558 (emphasis added).

It is indeed a strange form of constitutional interpretation that excises words that expand the scope of the constitutional protection and substitutes a restrictive term in their place. Such

³⁴See, e.g., SG Br. at 7 ("coercion is the touchstone of an Establishment Clause violation"); *id.* at 18 (Founders believed "the essence of an establishment of religion was some form of legal coercion"). Again, we are assuming that everyone agrees that an "official establishment of a national church" prohibited. See *supra* note 31.

disregard for language comports neither with the intent of the Founders, nor with the respect that should be accorded to the Founders' choice of words.

B. "Coercion" Is a Flawed Standard for Interpreting the Establishment Clause.

After decrying the "confusion," "division," and "demonstrated shortcomings of the *Lemon* test,"³⁵ SG Br. at 7, 24, the Solicitor General proposes that it be replaced by a new "coercion" test. He suggests that the interpretation of a coercion standard would not need to be developed *ab initio* because "coercion" has previously been "raised in many areas of constitutional law." SG Br. at 22 n.21 (citing *Arizona v. Fulminante*, 111 S.Ct. 1246 and *Schnecko v. Bustamonte*, 412 U.S. 218). Even if we ignore the extraordinary implications of the Solicitor General's analogizing religious rights to the rights of suspected felons undergoing police searches and interrogations, the fractured opinions in the very "coercion" cases he cites do not suggest that this "coercion test" is likely to lead us away from "confusion" and "division."³⁶

The cryptic guidelines offered for applying the "coercion test" presage neither coherence nor respect for our constitutional tradition. Curiously, after denouncing the supposed incoherence of *Lemon*, neither the Solicitor General nor Petitioners define "coercion," the word that they would use to revise the First Amendment. They also ignore the difficult issue at the heart of this case: predication of governmental benefits on participation at religious events. It can of course always be argued that no one

³⁵*Lemon v. Kurtzman*, 403 U.S. 602 (1971).

³⁶Five separate opinions were filed in *Schnecko* and four were filed in *Fulminante*.

is forced to accept benefits -- such as a high school diploma -- and thus no coercion has occurred. Thus does the "first experiment with our liberties" lead to the deterioration of a constitutional standard. Although the briefs of the Solicitor General and Petitioners do not explain the meaning of this new constitutional term, some of their discussion suggests a standard that completely ignores our constitutional tradition.

The Solicitor General advocates an Establishment Clause analysis of governmentally-sponsored religious activities that "shifts the focus away from an evaluation of the religious practice to an assessment of the autonomy of the observers of the practice." SG Br. at 22. The flaws of such a test, which focuses not on the government's action but on the circumstances of the individual, are readily exposed by hypothetical examples.

Suppose that the Utah State legislature, the majority of whose members are Mormon, passed a law providing that the following "official belief" would be read at every public high school graduation, court hearing, and meeting of the state legislature:

We, the citizens of Utah, believe that Joseph Smith was an inspired prophet of God; We believe that the God of this world is a physical being who became a God only after living as a person on another world; We believe that there are other Gods ruling over other worlds; We believe that God was the literal physical father of Jesus Christ and that Mary was the literal physical mother of Jesus Christ; We believe that the Book of Mormon is the inspired Word of God and is superior to any other book including the Bible.

According to the Solicitor General's test, Utah's promulgation of such an "official belief" would be constitutional, provided that no person is "coerced" into attending an event where the statement is read. Religious majorities would be free to promulgate official beliefs and practices because the Solicitor General "shifts the focus away from an evaluation of the religious practice to an assessment of the autonomy of the observers of the practice." SG Br. at 22.³⁷

Or suppose that the State of Rhode Island decides that all state buildings will display a crucifix and a photograph of the Pope. Once again the Solicitor General evidently would not look to the character of the religious practice, but only to whether people are "coerced" into visiting the buildings.

The Solicitor General and Petitioners would transform coercion, which heretofore has been a *sufficient* condition of an Establishment Clause violation, into a *necessary* condition. They would ignore or overrule this Court's proper holding that "proof of coercion" is "not a necessary element of any claim under the Establishment Clause." *Committee for Public Education v. Nyquist*, 413 U.S. 756, 786 (1973). See also *Abington v. Schempp*, 374 U.S. 203, 223 (1963).

³⁷Even if this shift in focus were appropriate, this Court has acknowledged that school children are not sufficiently autonomous so as to be immune from "religious indoctrination." *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). See also SG Br. at 26 ("We recognize that this Court's Establishment Clause decisions evince a special solicitude for young children").

III. RABBI GUTTERMAN'S PRAYER, LIKE ALL RELIGIOUS EXERCISES SPONSORED BY PUBLIC SCHOOLS, VIOLATED THE ESTABLISHMENT CLAUSE.

Almost twenty-five years before its decision in *Lemon*, this Court struck down a public school program that permitted members of the clergy to spend a few minutes each week at public schools conducting religious activities. *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948). Despite the fact that the challenged program was non-sectarian, was strictly voluntary, and cost the state no additional expense, this Court found that the program fell "squarely under the ban of the First Amendment." *Id.* at 210.

Mr. Justice Frankfurter, writing separately in support of the *McCollum* decision, faced the issues that were as important in that case as they are here today. The practice under review, he wrote,

presents powerful elements of inherent pressure by the school system in the interest of religious sects. The fact that this power has not been used to discriminate is beside the point. Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally. *That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. . . .* [The effects of such programs] are precisely the consequences against which the Constitution was directed

Id. at 227-28 (Frankfurter, J.) (emphasis added).

This Court has in fact consistently struck down all religious exercises sponsored by public schools. Against only one dissenting opinion, this Court held that school-sponsored Bible reading was a "violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion." *Abington School District v. Schempp*, 374 U.S. at 225. The *Schempp* Court, in a decision handed down ten years before *Lemon*, similarly repudiated the argument now advanced by the Solicitor General, and denounced the practice of letting a majority "use the machinery of the State to practice its beliefs." *Id.* at 202.

This Court also decided prior to *Lemon*, and without dissent, that the State may not proscribe teaching certain subjects because they conflict with religious doctrines. *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968). A decade before *Lemon*, and against only one dissent, this Court also struck down a state-sponsored prayer that closely resembled the prayer offered by Rabbi Gutterman. *Engel v. Vitale*, 370 U.S. 421 (1962).³⁸ See also *Wallace v. Jaffree*, 472 U.S. 38 (1985) (invalidating statute authorizing moment of silence at public schools); *Stone v. Graham*, 449 U.S. 39 (1980) (striking down statute requiring posting of Ten Commandments at public schools).

Recently, in upholding the right of students to join together in prayer, this Court emphasized that the *school was not the sponsor* of the devotional exercises. *Board of Education v. Mergens*, 110 S. Ct. 2356 (1990). The Court based the

³⁸The unconstitutional prayer in *Engel*: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422. Rabbi Gutterman's prayer: "God of the Free, Hope of the Brave. . . . May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled." Joint Appendix at 22.

constitutionality of the Equal Access Act, 98 Stat. 1302, 20 U.S.C. §§ 4071-4074, in part on the fact that "[b]ecause the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose was not to endorse or disapprove of religion." 110 S. Ct. at 2371. The *Mergens* Court also underscored the importance of the fact that it was the students who initiated the devotional speech. 110 S. Ct. at 2372. Here the students did not initiate the exercises. It was the school that decided to sponsor devotional exercises and to select members of the clergy to propagate that religious practice.

Petitioners and the Solicitor General are not bemoaning the difficulties of applying the *Lemon* test as much as they are repudiating a half-century of consistent constitutional adjudication that has prohibited public school sponsorship of religious activities.

Ironically, in addition to dismissing this half-century of decisions, the Petitioners and Solicitor General fail even to come to terms with the elements of coercion that are to be found in the case now before this Court. Petitioners and the Solicitor General argue that there was no coercion -- a term that they do not define -- in the school-sponsored devotional exercises in Providence and conclude that the prayers therefore pass constitutional muster. The Solicitor General asks only whether students were compelled to attend the graduation ceremony. Finding that they were not, he concludes that there was no coercion. SG Br. at 25; Pet. Br. at 36.

Having failed to find coercion where he looked for it, the Solicitor General then ignores state control over the devotional exercises that he champions:

- the public school directed that a portion of a public forum will be set aside exclusively for devotional worship;
- the public school decided that only clergy would offer prayers;
- the public school decided which members of the clergy would be permitted to pray;
- the public school determined the form of prayer that was acceptable; and the most clearly coercive;
- the public school determined that all students who wished to attend graduation must attend the ceremony containing the officially-sponsored devotional worship.

As Justice Frankfurter observed, such "voluntary" programs contain "elements of inherent pressure by the school system" and "are precisely the consequences against which the Constitution was directed" *McColum v. Board of Education*, 333 U.S. at 227-28.

Thus, even after he aimed at the wrong target, the Solicitor General missed his mark.

CONCLUSION

In *McDaniel v. Paty*, 435 U.S. 618 (1978), this Court properly did not hesitate to strike down a modern vestige of a common eighteenth-century practice that violated the religion clauses. This Court looked to the underlying principles of those clauses, not to the "Founders' practices."

During the past forty-five years this Court has consistently struck down public school sponsorship of devotional activities. This Court has never sanctioned public schools sponsoring religious exercises. It should not begin to do so now.

Respectfully submitted,

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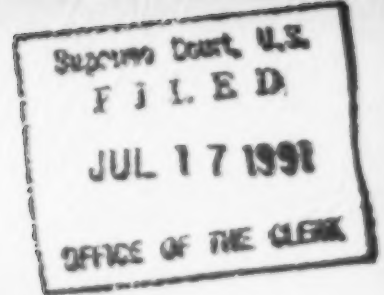
July 17, 1991

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(25)
No. 90-1014



**In the Supreme Court of the
United States**

October Term, 1991

ROBERT E. LEE, ET AL.,
PETITIONERS,

v.

DANIEL WEISMAN, ETC.
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF UTAH
IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

The ACLU Foundation of Utah, Inc. (ACLU-U) is currently sponsoring litigation concerning the validity of prayers at graduation exercises in two school districts in Utah. That litigation has been stayed pending the outcome of *Lee v. Weisman*. Thus, the amicus has a direct stake in the outcome of this proceeding.

The Utah litigation was filed in 1990. The complaint alleges that two of the school districts in Utah have an ongoing practice of permitting religious prayer, usually an opening invocation and a closing benediction, given by students as part of the official graduation exercises of the

high schools in those districts. Attached as an Appendix to this brief are transcripts of prayers said at some of the graduation exercises in 1990.

In both districts, graduation exercises are held in the schools themselves or in rented facilities when demand requires. School officials and staff are involved in planning the program and participate in the program, although most schools also have some degree of student participation in the planning and presentation of the program. Teachers and counselors have been required to attend in the past. Although their attendance was made voluntary for the spring of 1991, teacher and counselor plaintiffs in the current litigation assert that they want to attend the ceremonies to be part of recognizing their students' achievements. Although diplomas are only nominally distributed at these ceremonies, the ceremonies are the principal official recognition of students' graduation.

Granite School District decided that the schools in the Granite District attended by the named plaintiffs would not include prayers in this spring's graduation exercises, and the plaintiffs agreed not to pursue preliminary injunctive relief against Granite for spring 1991.

Alpine District has stated that it has an unbroken tradition dating from 1912 of having invocation and benediction prayers at graduation exercising. In a survey of students taken in the spring of 1991 at Alpine High, 345 (89%) stated that they wanted prayers at graduation while the other 41 (11%) expressed a preference against prayers in the ceremony.

On May 15, 1991, the District Court entered an order denying plaintiffs' motion for preliminary injunction regarding graduation exercises at Alpine for this spring, but imposing conditions on the context in which prayers

could be offered. The District Court stated: "In this court's opinion, there is a reasonable likelihood that the Supreme Court will follow its own precedent in *Marsh v. Chambers*, and regard invocation and benedictions at high school graduation ceremonies to constitute an exception analogous to opening ceremonies at legislative sessions." The District Court also concluded that the policies of Alpine were not invalid under *Lemon v. Kurtzman* because the primary effect of prayers would be to solemnize the occasion rather than to promote religion and because "excessive entanglement of government with religion is avoided because of clear guidelines as to acceptable content, no preliminary review by school officials of the prayers, and no monitoring." The District Court stated, however, that prayers at graduation "must be nonsectarian, nondenominational, and nonproselytizing."

The District Court also issued an order staying further proceedings in the Utah case pending this Court's ruling in this case.

SUMMARY OF ARGUMENT

Several lower courts have analyzed high school graduation prayers in terms of *Lemon v. Kurtzman* and *Marsh v. Chambers*, asking which of those cases controls. There is no need to ask this question nor to revisit the vitality of *Lemon* because the antecedent school prayer cases, as well as sound constitutional principle, should suffice to keep prayers out of the public schools and the official ceremonies that are part of those schools' processes.

Nevertheless, if this Court chooses to revisit *Lemon*, there is good reason to reject it as a test for deciding specific cases while retaining some of its principles as a guide to decision in crafting general rules. In this particular instance, the key elements of *Lemon* are the effects and en-

tanglement prongs. Those prongs could be said to create a "Catch-22" situation in which a school official is condemned for failing to monitor the religious content of a particular practice and condemned for monitoring it to the point of entanglement. This phenomenon will be referred to throughout as the effects-entanglement "conundrum."

The conundrum is actually a sensible way of expressing the point that there are some forms of aid or accommodation to religion that cannot be sustained under the establishment clause. Any practice that advances religion in the public schools, and which is not necessary under the free exercise clause, runs the risk of encountering this phenomenon. To prevent the practice from endorsing a particular religion, school officials would need to monitor and sanitize prayers to at least some extent. But monitoring and sanitizing would create a government-sponsored form of religion that itself offends the establishment clause. Therefore, a practice that tends to advance religion is not permissible in the public schools.

Some examples from Utah show how the conundrum works and argue strongly for adopting a rule banning graduation prayer without considering the precise context in which the prayer is offered. In the first place, some prayers recited at recent Utah graduation ceremonies are presented to show how a particular denomination's tenets and practices are part of the format of prayer. To avoid giving the appearance of endorsing this particular denomination, school officials would have to sanitize prayers out of this or any other identifiable format. Doing so would create a governmentally sanctioned form of prayer, a practice held invalid in *Engel v. Vitale* for good reason.

Secondly, adopting a rule that would make the validity of prayer dependent on the context of the particular

school and its connection to a particular religion would be extraordinarily divisive in the Utah context. It would be particularly distasteful and divisive to litigate the extent to which a particular school, its educational program and social life, were dominated by a particular religion. This type of litigation should be avoided by adoption of a clear rule that graduation prayer offends the establishment clause regardless of the degree of influence of any particular denomination within a given school.

I. APPLICATION OF *SCHOOL DISTRICT V. SCHEMPP* WOULD AVOID ANY NEED TO RE-VISIT THE HOLDING OF *LEMON V. KURTZMAN*

It is not entirely clear why many of the lower courts dealing with graduation prayers have analyzed these cases under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Simple application of *Engel v. Vitale*, 370 U.S. 421 (1962) and *School Distinct v. Schempp*, 374 U.S. 203 (1963) should be sufficient without moving to the later decision in *Lemon*. ACLU-U suggests that the Court should apply *Schempp* and not concern itself with the continued vitality of *Lemon* or its three tests. Particularly compelling is the following language from *Schempp*:

While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs.

This simple assertion answers all of the contentions made by the defendants in the Utah litigation. A graduation exercise is state action. Prayers that are part of that ceremony are a religious practice making use of state machinery. There is nothing to prevent any student or other

participant in that ceremony from praying in a way that does not impose on other participants; indeed, there would seem to be a clear right of any participant to engage in silent prayer or even open prayer that neither disrupts nor becomes part of the official ceremony. The Utah defendants have claimed that prayer is protected by the free exercise rights of the majority, but as *Schempp* says, those rights do not include the right to use state machinery in pursuit of their religion. And as *Schempp* and *Engel* point out, use of the state machinery, at least in the public school context, for religious practices is inherently coercive.

Defendant school districts in the graduation prayer cases have relied heavily on *Marsh v. Chambers*, 463 U.S. 783 (1983) (legislative prayer), and have asserted that it constitutes an exception for ceremonial occasions from the *Lemon* line of cases. But *Marsh* should not be read as constituting an exception to *Schempp*; there are abundant distinctions between the setting of high school graduations and legislative sessions. Nevertheless, we recognize that many courts have turned to *Lemon* in analyzing the graduation prayer issue, and we will provide the Court with our observations of the vitality and applicability of the *Lemon* tests.

II. IF *LEMON* WERE REJECTED, THE AVAILABLE TESTS WOULD STILL PRECLUDE PRAYERS AT PUBLIC SCHOOL GRADUATION EXERCISES.

There are several related reasons why the lower courts may have approached the problem of graduation prayer from the perspective of *Lemon*. One is that *Lemon* has been mentioned by some Justices of this Court in some school contexts, such as the moment-of-silence and

Creation-Science cases, thus making it seem applicable to this controversy. In addition, *Marsh v. Chambers* was decided later as an apparent exception to the holding of *Lemon*, and is the precedent on which most supporters of graduation prayer rely. The combination of these circumstances, coupled with the questioning of *Lemon* in a number of opinions in this Court, makes *Lemon* seem important to several courts dealing with this issue despite the surface applicability and unquestioned vitality of *Engel* and *Schempp*. Therefore, ACLU-U will discuss the vitality of *Lemon* and what options might exist for the Court.

Many commentators, and some members of this Court, have noted problems with the Court's reliance on the three-pronged *Lemon* test. Some of those problems have been disclosed in the handling of graduation prayer cases in other courts. We believe that there are two inter-related problems that might justify dispensing with the *Lemon* prongs as tests for individual cases but that those prongs are indicative of how the Court should construct rules for generic groups of cases, such as the graduation prayer group.

A. The Problems With *Lemon* Stem From Its Use in Specific Cases, Not From Its Choice of Factors

Lemon was decided in the context of, and for the purpose of analyzing, public aid to religious enterprises, particularly public assistance to religious schools. By contrast, we are dealing here with questions of religious practices in the public schools. It would seem that *Lemon's* concerns over effect and entanglement are relevant to the latter problem only when the public school attempts to accommodate religion and then to control the nature of the religious practice. Graduation prayer is neither a

necessary nor a wise accommodation of religion, and the *Lemon* problems should be a guide to showing that it amounts to a classic establishment problem.

1. *Lemon's purpose prong neglects the mixed purposes that often exist for a single decision.*

The purpose prong of *Lemon* seems to assume that there is a single purpose for every human decision or course of action. That assumption has not held true for many issues of public support for religious institutions. For example, in thinking about public financial support for religious schools, such as tax breaks or provision of books and supplies, the state has been found to be motivated by a conscious desire to support a religious institution for a secular purpose. The state may well want to support religious schools to take some of the brunt off the public school system. Assume, for example, that it costs \$4000 to educate a student in the public school system. If a religious entity were able and willing to provide a comparable level of education with \$2000 of support from the public treasury, then the state could save \$2000 per child by paying \$2000 directly to the religious school. This shows that the state could well have mixed motives for supporting the religious schools. *Mueller v. Allen*, 463 U.S. 388 (1983); see also *Wolman v. Walter*, 433 U.S. 229 (1977); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980).

Conversely, turning from support for religious schools to involvement of religious issues in the public schools, motivation is not helpful in assessing the impact of a particular practice. For example, in *Wallace v. Jaffree*, 472 U.S. 38 (1985), the motivations of the legislators who voted for the statute were not important to the question of what the children in those schools would believe to

be the message they were being given by the State. What is important is the impact on the audience. If the statement made at the beginning of the day did not include the message that the moment of silence were being provided for "meditation or voluntary prayer," then a moment of silence might well have been acceptable regardless of what religious motives could have been found in the legislative history.

As another example, Justice Scalia took the majority in *Edwards v. Aguillard*, 482 U.S. 578 (1987), to task for focusing on the motives of the legislators who promoted the "Creation-Science" statute. But the majority in *Edwards* also relied heavily on the practical effect of the statute in promoting or "endors[ing]" a particular religious doctrine." As with most legislative acts, the motives of the legislators were probably mixed and certainly would be irrelevant to the degree of impact that the statute would have in the public schools. The critical issue in the public school setting is the day-to-day experience of the student. Under the directives of the Creation-Science statute, especially in light of its attendant curriculum guides and oversight board, students might well have received the message that the religious explanation of creation was entitled to as much or more credence than the "scientific" explanations. This result would have occurred because the scientific hypothesis of instant appearance of a universe virtually unchanged from its present state would not likely be presented independently of the corollary religious implications. The effect then would be to persuade each student that the state had taken an official position endorsing the religious explanation of creation. The only way for the state to remain neutral as between religious and "scientific" explanations would be not to require official mention of the religious explanation.

The Creation-Science dispute presents the prospect of some interesting converse problems. What if the statute had prohibited the teaching of scientific theories that tended to disprove the theory of evolution? This statute would almost certainly have impeded the academic freedom of the teachers. What if the statute prohibited the teaching of competing religious theories? Probably the result would also be against the statute for the same reasons, although this is a closer question. The full import of *Edwards* must be to avoid imposition on teachers of how they present material in the classroom, at least so long as the teacher does not use the podium for promulgation of his or her own religious beliefs. This realization reinforces the view that the motives of the legislators are not helpful in assessing the impact of a practice that has some tendency toward establishment of religion in the public schools. The essential question instead is the degree of that tendency.

2. *Lemon's effect-entanglement "conundrum" shows that some types of support for religion inevitably produce official dictation of religious content.*

In many of the cases involving public aid to religious schools, the Court has found either (1) that there is an effect of aid to religion because the public officials have not monitored use of the aid to prevent that effect or (2) that there is an excessive entanglement of state and religion because public officials would be monitoring the use of aid to prevent its being used for support of religious activities. The monitoring required to prevent a primary effect of aid to religion is sometimes found to entangle the school and public officials to an excessive degree and thus to violate the establishment clause. This analysis appears to create a "Catch-22" situation in which the public aid may be invalid if it is allowed to be used for religious pur-

poses but also invalid if officials monitor its use to guard against religious use. *Aguilar v. Felton*, 473 U.S. 402, 420 (1985) (Rehnquist, J., dissenting).

The conundrum is not as implausible as it might seem. What the Court is recognizing, however cumbersome the *Lemon* approach, is that there are certain kinds of aid that cannot be provided without requiring public officials to monitor how teachers in religious schools spend their time. Thus, the interplay of the effect and entanglement prongs is useful in constructing a rule for decision with regard to different kinds of aid. For example, these prongs illustrate how the state could provide textbooks for physical science classes without involving itself in how the science classes are taught. On the other hand, provision of teachers' salaries would require monitoring to ensure that the teachers are actually teaching science without religious overtones, thus involving the state in preferring one instructional approach over another and violating neutrality toward religion.

The conundrum arises with the inculcation of religious messages into the public schools when those schools attempt to soften the denominational impacts of particular messages. Utah presents an example from earlier litigation. Many public high schools in Utah are associated with a Mormon Seminary school, which is a church-owned facility adjacent to the public school in which religion classes are offered during released time from the public school. A former rule of the Utah State Board of Education said that academic credit for the religion classes could be counted toward graduation requirements in the public schools so long as the content of the religion classes were historical or philosophical and "not mainly denominational." In *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981), the Tenth Circuit held that the public schools

could not monitor the content of the religion classes to determine whether they were predominantly sectarian for the purpose of deciding whether to give academic credit for those classes toward the satisfaction of high school diploma requirements. Monitoring to sanitize content of those classes would inhibit religion, or advance a certain form of religion, in a manner that would offend the establishment clause. So far as we know, no Utah school district has accepted credit following *Lanner* for instruction in the Seminars.

Lanner's approach seems paradoxical at first blush. But if academic credit can be accepted by public schools for avowedly religious instruction when transferring credit from a religious school, then the outcome is simply a rule that recognizing academic credit from religious instruction does not advance religion. On the other hand, the Mormon Seminaries are not fully accredited schools and it may not be possible to accept credit from them in any event.

The conundrum becomes acute in the graduation prayer set of cases if courts were to rule, as the Sixth Circuit seems to have done, that prayers are permissible when they are monitored by school authorities to sanitize from them references to deities or other theological attributes. See *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987). This judicial requirement should offend the entanglement prong of *Lemon* because it results in governmental fostering of a particular type of religion. The conundrum is most acute when the Sixth Circuit speaks of permitting prayers in the format of an "American civil religion." *Id.* at 1409. Judicial or administrative creation and supervision of an American civil religion would be anathema to both the Establishment and Free Exercise Clauses.

The District Court in Utah may have created this same problem when it ordered that prayers "should be under a policy which ensures no direct or indirect coercion, no identification with a particular religion, and that such be non sectarian, non denominational and non proselytizing in character." The court added that there could be "no preliminary review by school officials of the prayers, and no monitoring." How these conflicting mandates are to be accomplished is a mystery, especially in light of the distinctly denominational prayers from prior graduations that served as a backdrop to the court's order. See p. 25 *infra*.

The conundrum created by the effects and entanglement prongs of *Lemon* could be avoided by using those prongs as guidelines to formulation of results in generic groupings of cases. If a particular form of aid to religion or accommodation to religion cannot be accorded without entangling oversight, which would itself either advance or inhibit religion, then that particular form of aid should not be permissible. *Lemon* itself need not be applied to the individual cases that arise under the heading of religion in the public schools, but its tenets do lead to formulation of a general rule that official sanctioning or observance of religious practices is highly suspect. In the context of graduation prayer, that analysis shows that prayer cannot be permitted without either advancing religion or else involving public officials in a monitoring of religious observances that would promote one form of religion over others.

B. Application of Either an Endorsement or Exclusion Test Should Preclude Graduation Prayers Without Reference to School-Specific Context
Allegheny County v. ACLU, 109 Sup. Ct. 3086

(1989) produced a debate among the Justices of this Court over what test should replace the *Lemon* test if it were abandoned. Two leading contenders were that a practice would be invalid (1) if the practice constituted endorsement of religion (O'Connor, J., concurring) or (2) if "nonadherents would be made to feel like 'outsiders'" (Kennedy, J., dissenting). If either of these tests were adopted, graduation prayer should fail.

The parties will no doubt address thoroughly the question of how each of these tests would apply to graduation prayers. The interest of ACLU-U in this question is in having the Court adopt a rule with regard to graduation prayer that does not depend on the precise context of the individual prayer. The opinions in both *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *Allegheny County* seem to make the validity of a particular practice turn on the surrounding circumstances. As Part III of this brief will show, requiring proof and analysis of the degree to which a particular graduation ceremony is part of a pervasive pattern of religious endorsement within a given school would produce deeply divisive litigation. In the context of a state such as Utah, the pervasiveness of one religion may be thought to be important to the validity of a particular practice. But on further reflection, it can be seen that pervasiveness with official support is precisely what the establishment clause is designed to prevent. Therefore, any practice that could tend in the direction of support of that pervasiveness ought to be prohibited by the establishment clause without proof that it is part of a pervasive pattern that already exists.

C. Neither Neutrality Among Religions Nor Voluntariness Is Possible in the Graduation Context

Another contender for replacement of the *Lemon*

test is the so-called neutrality test by which government would be allowed to support a variety of religious practices so long as it were neutral toward all religions. In other words, the argument is that the establishment clause does not require neutrality between religion and nonreligion but only neutrality among religions.

Again, we assume that the parties will thoroughly address the application of this principle to graduation prayer. Suffice to say that graduation is a single event in any individual student's life so that it would be impossible for a single graduation ceremony to encompass prayers or equivalent observances from all religions.

On the other hand, graduation is the culmination of an extremely critical stage in the development of young adults. If those high school students were aware that their experience would culminate with a religious observance, then their entire school experience would be colored by this apparent endorsement of religion. They would also be made to feel distinctly "outsiders" in their own schools. Any messages of a religious nature that are received during the school experience thus obtain greater force and significance. It is for this reason that the persons most affected by graduation prayer are not the graduating seniors but the students in the earlier classes who are receiving the reinforced message that religion is an important part of their schooling.

Coercion or voluntariness is irrelevant to this case because the real harm is spread back through the school to the entire student experience. Moreover, coercion is irrelevant to establishment clause analysis in a more fundamental sense. We will provide only a brief example to bolster the arguments of the parties on this point. Suppose, what could actually be the case, that we were deal-

ing with a very small town in rural Utah in which all the population and high school graduates were adherents of the same religious denomination. School prayers in that setting would not be coercive, nobody would be offended, but the situation would be a quintessential establishment of religion. The point of the establishment clause is to prevent establishment from occurring with official backing. In the example of the small town, it is critical that the machinery of the state not be used to maintain the existing dominance of a single religion. If that dominance persists without official assistance, that is a cultural phenomenon outside the concerns of the Constitution, but official backing is the concern of the establishment clause.

III. A BRIGHT LINE RULE IS REQUIRED TO AVOID EITHER DICTATION OF RELIGIOUS PRACTICES OR HIGHLY DIVISIVE LITIGATION OVER THE RELIGIOUS CONTEXT OF A PARTICULAR SCHOOL PRACTICE.

ACLU of Utah is currently engaged in litigation concerning the validity of graduation prayers in school districts in the state of Utah. The complaint in that case includes allegations that prayers and other religious observances are a regular part of the life of those schools. Our interest in the *Lee v. Weismann* outcome includes the hope that the Court will reach a rule that does not require litigation of the pervasiveness of religious observances in a particular school. To show why that type of result would be particularly onerous, we will sketch the background of religious and public school ties in the state of Utah, relying solely on published works rather than on court records of the Utah litigation, which has not yet resulted in an evidentiary hearing. One of the principal sources for the historical sketch below is M. L. BENNION, *MORMONISM*

AND EDUCATION (1939), published by the Department of Education of the Mormon Church.

A. The Utah Public School System Is Closely Linked to the Mormon Educational System

To illustrate some of the modern close working relationships between the public schools of Utah and the Mormon Educational System, we will set out a very brief history regarding the public and private schools in the state. In many ways, that history parallels the history of several New England colonies two hundred years earlier, but there has been no cataclysmic event comparable to the American Revolution and Framing of the Constitution to amalgamate the cultural life of Utah with that of the rest of the States.

Utah was settled (following aboriginal occupation by several Indian tribes, exploration by the Spanish, and occasional use by trappers) by the congregation of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormons. Having suffered religious persecution and expulsion from Missouri and Illinois, the congregation left what was then the United States and moved *en masse* to the Great Basin area to establish "Zion." Zion was a consciously theocratic society which incorporated church organization and institutions into a form of civil government by which the new settlement was regulated. The Mormon community was hierarchical, tightly controlled, and economically efficient. *See generally* C. PETERSON, *UTAH: A BICENTENNIAL HISTORY* (1977).

Prior to statehood, Utah was widely perceived as a theocracy. Statehood was granted in 1896 only after federal efforts to break up the Mormon Church and to end the practice of polygamy. Efforts to obtain statehood extended over more than 40 years, beginning in the early

1850's but foundering first on the issue of slavery and then later on the twin issues of polygamy and the theocratic institutions of the territory. See generally E. LYMAN, *POLITICAL DELIVERANCE: THE MORMON QUEST FOR UTAH STATEHOOD* (1986); Flynn, *Federalism and Viable State Government — The History of Utah's Constitution*, 1966 UTAH L. REV. 311. In the Edmunds Act of 1882 Congress outlawed polygamy in the territory and created the Utah Commission, a five member board which replaced local authority and provided a federal presence in the territory. The Edmunds-Tucker Act of 1887, among a number of other highly stringent provisions including appropriations for bounty hunters to pursue polygamists, dissolved the corporation of the Church of Jesus Christ of Latter-Day Saints and confiscated its property and assets to the United States. In the early 1890's the Mormon Church Presidency banned the practice of polygamy and dissolved the official church political party known as the People's Party. Pursuant to these measures of good faith on the part of the church, Congress then repealed the confiscatory provisions of the Edmunds-Tucker Act and granted statehood in 1896 for the State of Utah.

The Mormons who populated the Territory during the 1850's immediately established schools in each settlement of the territory. In almost all instances, a single building served as school, chapel, and seat of local government. Education was a central part of the church mission because secular learning was seen as part of universal truth, which emanated from a divine source. According to the Mormon philosophy, the sciences had as their content the discovered truths of God, and the humanities contained the revealed truths of God. All of Mormon education, then, served a religious objective. As Brigham Young instructed one school official, "Whatever you

teach, even the multiplication tables, do it with the spirit of the Lord." BENNION, at 125. "Like the Israelites of old, the leaders and prophets of this new theocracy recognized from the beginning that the realization of their goals must be attained through the establishment, not only of a unique ecclesiastical, but a unique economic and educational system." *Id.* at iii (Foreword by F. Swift).

As statehood approached, it became apparent that a separation was needed between the public schools and the church. The non-Mormon minority, which had significant power through ties with the federal government, vigorously pressed for the establishment of a free public school system devoid of sectarian influence, while at the same time schools of other denominations were providing effective education more cheaply than the financially strapped Mormon schools could. BENNION, at 145. The Edmunds-Tucker Act had taken administrative control of the Mormon schools from the church and placed it in the hands of a federal commissioner who was specifically directed to eliminate the use of Mormon scripture as texts in the schools. Not only were Mormon children being deprived of studying the faith of their fathers in the public schools, but many of them were being taught in and influenced by other denominational schools and their doctrines. *Id.* at 136. These feelings led to the establishment of the Mormon "academies," which were secondary schools not under the mandate of the Edmunds-Tucker Act but designed for education of Mormon youth. *Id.* at 147.

The Free School Law of 1890 established a system of free public schools in the Territory. The law called for compulsory attendance and a nonsectarian Board of Education. Because church members could not afford both to pay taxes for support of the public schools and to

pay tuition at the Mormon schools, the church leadership eventually came to support the public schools while attempting to educate teachers for those schools in Mormon colleges. *Id.* at 135.

In 1920, the church abandoned its own system of schools in favor of two related devices. One was the creation of a "Seminary" for religious instruction of public school students and the other was the creation of "normal" schools for the training of teachers for the public schools.

The objective of the Seminary system was to locate a Mormon facility adjacent to a public high school for the offering of religious instruction during school hours to students who would be released from the public school for that purpose. In this way, "L.D.S. students could and would receive the same benefits of religious education as in church schools with about one-eighth the educational investment or expenditure." J. CLARK, *CHURCH AND STATE RELATIONSHIPS IN EDUCATION IN UTAH* 307 (Utah State Univ. dissertation 1958). The seminary system continues today in much the fashion originally intended. There are over 100 seminaries in operation. For those public schools at which there is not a seminary located in proximity, religious instruction is typically carried out at the local ward house of the church after school hours.

The seminary system was analyzed in the 1950's after this Court's rulings in *McCullum* and *Zorach*. Guidelines were drawn up by the Utah State Board of Education in an effort to ensure that the released-time components of the system complied with this Court's rulings. The constitutionality of the system was not litigated, however, until 1978.

Lanner v. Wimmer, 463 F.Supp. 867 (D. Utah 1978), *aff'd & rev'd in part*, 662 F.2d 1349 (10th Cir.

1981), resulted in striking down some aspects of the interconnected operations of the public schools and the Seminaries. The plaintiffs attempted to show that the Seminaries affiliated with the Logan Junior and Senior high schools were so closely interconnected with the public schools that their operation was in violation of the establishment clause. Among the factors relied upon were the granting of academic credit for coursework in the seminaries, use of seminary attendance in counting student attendance for state funding purposes, reporting of grades from the seminary to the public school, interconnected bells and public address systems, taking of attendance and registration for seminary by public school employees or student workers, architectural integration of the seminary and public school buildings, and social interactions of the two school systems. The district court held that only some of the academic credit violated the establishment clause. Two "Bible study classes are religious and sectarian in nature. They are not planned and taught from a strictly historical, literary or comparative view-point, but are geared toward reinforcing LDS beliefs."

On appeal, the Tenth Circuit affirmed the injunction against granting credit for these courses but for essentially the opposite reason as given by the district court. The court of appeals looked at the State Board policy that allowed credit only for coursework that was "not mainly denominational" and found that monitoring the coursework by public school officials would constitute impermissible entanglement.

The 1920 decision to establish the Seminary system coincided with a decision to open Mormon "normal" schools for the training of teachers who would then be available for teaching in the public schools. Through this device, the church officials hoped to influence the educa-

tion of all children in the state without assuming control of the public schools. Interestingly, this decision was made with the encouragement of the State Superintendent of Instruction. BENNION at 186-188. Most of those schools have been turned over to the state, and today the church's higher education facilities consist only of Brigham Young University in Utah and Hawaii and Ricks College in Idaho. It might be difficult to document to what extent the influence of the Mormon training of teachers is still felt, but there is little question that it exists at least in some communities. A number of studies have been made of various facets of this question. See CLARK, *supra*; D. FOXLEY, MORMON MYTH OR MONOPOLY: A CONTEMPORARY STUDY TO DETERMINE THE PERCEIVED INFLUENCE OF THE MORMON CHURCH ON UTAH POLITICS (Utah St. Univ. thesis 1973); R. POORE, CHURCH-SCHOOL ENTANGLEMENT IN UTAH: *Lanner v. Wimmer* (Univ. of Utah dissertation 1983). The word that best sums up the impact of Mormon culture on the public schools is "influence," typified by "local elites" who determine policy and practice in their own communities. W. REES, THE PROFESSIONAL EDUCATION ASSOCIATION MOVEMENT IN UTAH: AN INTERPRETIVE HISTORY (Univ. of Utah dissertation 1977).

One author has described Utah society in religious terms:

Utah society forms groups along such conventional lines as political persuasion, profession, education, place of origin, age group, ethnic background and level of income. Nevertheless, the Mormon/non-Mormon division cuts through and influences all other grouping arrangements. . . . In the place of disruptive political thought, tension now vents itself in group loyalties, in a thousand private adjustments, and by the more or less

constant awareness that this particular social division, like death and taxes, is a significant fact of life in Utah.

PETERSON, UTAH - A BICENTENNIAL HISTORY (1977).

A political science professor viewed the question in this fashion:

Whenever one church claims the membership of 72% of the people of the state, as the Mormon Church does in Utah, its doctrines and practices are certain to have a pervasive influence on the folkways of the state. In so doing, even if it never took a stand on a political question, the Mormon Church would still significantly influence the metes and bounds of the political struggle in Utah.

Williams, *The Separation of Church and State in Mormon Theory and Practice*, 1 DIALOGUE 30 (1966).

The degree of this dominance might be expected to change as the level of dominance of one religion in the population changes. At the county level, Mormon adherence ranges today from around 50% in the Salt Lake vicinity to well over 90% in rural counties of the state.

The Utah State Board of Education has made a firm decision to place control of the schools in the hands of local school districts. (Brief for the States of Utah, *et al.*, in Support of Petition for Certiorari, at p.2) The combination of the State Board's basic policy of local control and the dominance of Mormon leadership in local communities could produce a dominance of Mormon culture and thought in the public schools. The Seminary system is one example of how the day-to-day life of the high schools is affected by the Mormon presence.

In the *Lanner* litigation, there was testimony about the degree to which the everyday social life of the Logan high school was governed by whether a student was Mor-

mon or was attending the Mormon seminary. That testimony even included description of physical confrontations over the issue. Even more telling, perhaps, would be the more subtle experiences of those students who felt the group pressure to conform to the dominant religion or abandon various aspects of adolescent social life. As another example, in response to assertions of discrimination in one school district, the State Board of Education conducted a survey in which 75% of the nonMormon respondents reported that they suffered religious discrimination "sometimes" or "often." *KUTV v. State Bd. of Education*, 689 P.2d 1357, 1359 (Utah 1984).

B. Any Result That Depends on the Content or Context of Prayers Would Be Unworkable

The combination of *Lynch* and *Allegheny* make the validity of some public religious observances depend on the context in which they are conducted. In the case of graduation prayer, a contextual test could focus either on the degree of pervasiveness of one religion within a particular school or on the degree to which school officials controlled the content of the prayers. Either would be unfortunate! Especially destructive would be litigation over the extent to which a particular religion dominates a particular school.

1. *It is impossible to have nondenominational prayers without official monitoring and dictation of content.*

One way of approaching the issue of context would be to focus on the degree to which particular prayers promoted a certain denomination or religious group. The district court in Utah ordered that graduation prayers "must be nonsectarian, nondenominational, and non-proselytizing." The court also stated, however, that there

could be "clear guidelines as to acceptable content, no preliminary review by school officials of the prayers, and no monitoring." The first objective of the court's order is impossible in light of the second objective.

To illustrate, it is only necessary to glance briefly at the sample prayers from prior graduation ceremonies attached as an Appendix to this brief. Each opens with "Our Father in Heaven" or "Our Dear Heavenly Father." Each closes with "We say this [or these things] in the name of [the Son] Jesus Christ. Amen." In the body of the prayer, each first thanks the deity for certain things or events and then makes certain requests.

The standardized format of these prayers is hardly accidental. They are instantly recognizable as adhering to the tenets of a particular denomination. To avoid this, school officials could prohibit address to an anthropomorphic deity, in which case these prayers could not be offered or would at best become meaningless. Another approach would be to prescribe a standard form of prayer different from the standard form displayed here. That would be tantamount to government-imposed religion of the precise nature struck down in *Engel*.

There is no conceivable way to achieve the twin results of nonsectarian or nondenominational prayer and a lack of official monitoring of the content of prayers. This is a classic illustration of the conundrum outlined in the effects and entanglements branches of the *Lemon* test. It is because government cannot engage in recognition of religious practices without either endorsing a particular denomination or dictating the content of prayer that prayers at high school graduation offend the establishment clause.

2. *Litigation over the context of graduation prayer would be extraordinarily divisive in Utah*

A second way of approaching the context of graduation prayers would be to ask to what extent a particular school is dominated by a particular religion. We will attempt to describe what litigation would look like if this Court were to promulgate a rule making the validity of a particular graduation prayer depend upon the school context in which the prayer were offered.

Some evidence might consist of public records, such as the minutes of school board meetings or memoranda of the school officials. But this would not be the heart of the problem. A litigator would be faced with a difficult ethical choice between failing to litigate the issue completely and zealously or asking students and parents essentially to become spies on their classmates and teachers. For example, one might accumulate data about the number of instances in which certain doctrinal or cultural references were made in class. Every religion carries its own set of code words and liturgical references that would be understood to have religious connections. References by teachers or classmates to these well-understood "insider trademarks" could be recorded. Another salient point of evidence would be the structure of students' social lives. To the extent that students structured their social activities around church activities, this would tend to show the degree of pervasiveness of the dominant religious culture. Students might be called to testify about the number of social activities arranged through the Seminary, about the number of times that a date was refused because the asker was not of the proper faith, about the number of times that religious references were made in social contexts. In other words, students might be asked to testify about inti-

mate experiences, fears and concerns for purposes of litigation.

These are daunting prospects for at least two reasons. First, they present the possibility of further polarizing and dividing communities that are already separated around the issue of religion. The ACLU of Utah takes separation of church and state as a goal largely because it wishes to keep religion from being a divisive influence in the lives of all citizens. To create divisiveness while trying to eliminate a divisive influence in the schools would be a very difficult moral choice.

The second reason for hoping to avoid this type of litigation is the effect that it would have on the students themselves. The most significant impact of graduation prayer is on the students still in the school rather than on the graduating senior. The nonMormon student is already under intense pressure from peer group isolation. Conversely, the Mormon student may feel guilt or pressure from public religious displays. To ask either student to become a complainant or witness in litigation and relate intimate incidents from his or her life in a public trial could be debilitating to the normal adolescent.

Of course, we can only speculate how the litigation strategy would unfold under different rulings by this Court. What is important to us is that the Court not require litigation of the issue of the extent to which one religion has a dominant influence within the public schools generally and particularly not litigation of that issue within any one school. Any ruling that leaves the validity of graduation prayer subject to the context in which it is offered creates that danger. It is true that any such litigation would be an attack not on the Mormon Church or its adherents but on the public school system's inculcation

of any church's particular tenets or culture. But it could not be presented so that others would understand it that way. It would inevitably be seen as an attack on Mormons, or at least an attack on religion generally. At best, it would heighten tensions and sharpen divisions along the lines of religious groups, a phenomenon that the establishment clause itself is designed to prevent.

Therefore, we urge the Court to adopt a bright-line rule that graduation prayer is either valid or invalid. As indicated, we believe that rule should be that graduation prayer is invalid because of its inherent propensity to endorse religion and thus to tend toward an establishment of religion.

CONCLUSION

For the above reasons, we respectfully urge the Court to adopt a rule that makes prayer at graduation ceremonies unconstitutional regardless of the context in which that prayer is presented.

Respectfully submitted

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APPENDIX

OREM HIGH SCHOOL GRADUATION

June 1, 1990

Invocation

Our Father in Heaven,

We come to you today from all walks of life
and varied situations and religions,

And we just want to express our thanks and gratitude
today for the opportunities we have had
to get a good education.

We are thankful for the teachers, for the administrators,
for our parents and our family and our friends
who encouraged us and helped us make us
where we are today.

We are thankful for the many freedoms we enjoy
by living in a free country.

And bless us Father, as we go out that we may defend these
rights, and help us that we may rise to our full
potential, and live lives that may be beneficial
to ourselves and others.

We say these things in the name of Jesus Christ

Amen.

A-2

OREM HIGH SCHOOL GRADUATION

June 1, 1990

Benediction

Our Father in Heaven,

Once again we come before thee to offer our thanks.

We are so grateful for those who have helped us
in our high school career.

We thank Thee for our friends that have offered us
encouragement in the hallways and the classes.

We are thankful for our parents who have given us
the help we need at home.

We are thankful very much for our fine faculty,
for all the hours they spent preparing lessons
for us, grading papers, and giving us outside
encouragement.

We are thankful for the facilities we were able to
use this day,

And we ask that as we leave after our graduation,
we might be able to use the knowledge
that we have gained from all of our educational
career in a manner that would help those around us.

We ask that we can always remember to lift
the spirits of our neighbors.

We say these things in the name of the Son, Jesus Christ

Amen.

A-3

GRANITE HIGH SCHOOL
COMMENCEMENT EXERCISES

June 1, 1990

Our dear Heavenly Father,

We are gathered here on this beautiful evening to
honor the graduating class of 1989,

We ask that everyone can be on their best behavior
this fine evening and we'd like to thank all the many
people who brought us here today,

We'd like to thank all the many people who
brought us here today, our teachers, our family and
friends.

When the time comes, I hope we can go home.

We say this in the name of Jesus Christ. Amen.

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STATEMENT OF INTEREST*

The Council on Religious Freedom is a national nonprofit organization which was formed to uphold and promote the principles of religious liberty. Its Board of Directors is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis. Americans United for Separation of Church and State is composed of some 50,000 members of various religious beliefs and some of no religious affiliation residing throughout the United States.

Both *amici* have been involved in a number of cases involving the Religion Clauses of the First Amendment. Americans United has been active over the years in most of the major Establishment Clause cases from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), and is constantly called upon by individuals who believe that government has violated constitutional proscriptions of church-state separation. Americans United is currently involved in cases now pending in the lower courts which will be directly affected by the outcome of this case.

Council on Religious Freedom has as one of its major interests the relationship of free exercise principles to non-establishment concerns with the view of maximizing religious freedom.

Both *amici* are particularly apprehensive about the scrapping of approximately 30 years of judicial precedent and the large body of law that has been established to be replaced by an untried and, in the opinion of *amici*, a defective test currently advanced by petitioners and the government.

SUMMARY OF ARGUMENT

Hundreds of federal and state court decisions (Appendix A) testify that the *Lemon* test that this Court synthesized in 1971 from its earlier church-state decisions is a workable and integral part of law of the Establishment Clause of the First Amendment. For this Court to radically alter

* This brief is submitted with the written consent of both parties.

that law, as requested by petitioners, the Solicitor General, and numerous *amici curiae*, would distort the roles of both church and state when their interests impact upon both individual citizens and public life; would deviate seriously from the original intent of the Framers of the First Amendment; and would introduce uncertainty, if not chaos, into a difficult area of constitutional law. In addition, the new test proposed by the Solicitor General would be neither helpful nor consistent with the principle of individual freedom embodied in the Religion Clauses. For these reasons, plus others stated in this *amicus* brief, Council on Religious Freedom and Americans United for Separation of Church and State urge this Court either to retain the traditional three-part *Lemon* test when it renders its decision in this case or to base any change in Establishment Clause theory on the insightful endorsement test that has been articulated by Justice O'Connor.

ARGUMENTS

INTRODUCTION

Petitioners seek to overturn judicial precedent and have this Court, for the first time, validate religious exercises conducted as a part of public junior high school graduation ceremonies. Petitioners, aided by the Solicitor General of the United States, argue that an agent of a school district, in this case a school principal, may include prayer in junior high school graduations without offending the non-establishment proscriptions of the First Amendment to the United States Constitution.

The Solicitor General asked this Court to hold that "the practice at issue here clearly does not violate the Establishment Clause, because it does not coerce religious exercise or bring to bear other forms of compulsion to conform." Brief for United States in Support of Pet. for Cert. at 18. According to the government, the religious portion of the graduation ceremony conducted by a member of the clergy is only a demonstration of "respect [for] the religious heritage of the community." *Id.*

The government attempts to enlarge the scope of this case beyond its specific facts. For example, its *amicus* brief specifically suggests that the Court "reconsider the application of the *Lemon* test to the attempt to accommodate the Nation's heritage in our public life." *Id.* at 8.¹

I. THIS COURT'S HOLDING IN *MARSH* IS NOT APPLICABLE TO RELIGIOUS WORSHIP AT AN EVENT CONDUCTED BY PUBLIC SCHOOL EMPLOYEES ACTING IN THEIR OFFICIAL CAPACITY.

Petitioners and the Solicitor General rely largely on this Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, however, this Court specifically noted that the individual claiming injury by the practice was an adult, presumably not readily susceptible to "religious indoctrination." *Id.* at 792. Apparently, in order to fit a square peg into a round hole, the Solicitor General argues that a graduation ceremony is a civic ceremony occurring only once a year and is addressed not to children alone but to families as a whole. Brief for United States in Support of Pet. for Cert. at 18. The Solicitor General does, however, claim to "recognize that the special character of the public school setting has heightened this Court's sensitivity to subtle forms of coercion." *Id.* at 18.² The government argues that there can be no feelings of coercion experienced at a student's graduation because families and friends also attend. Brief for United States at 8.

It is somewhat difficult to understand how a parent's presence in a graduation audience in some way lessens

¹ It is not clear that the government pursues only a reconsideration of *Lemon* as applied to celebrations of the nation's heritage in our public life. In its brief on the merits, the government states that "[t]his case offers the Court the opportunity to replace the *Lemon* test with the more general principle implicit in the traditions relied upon in *Marsh* and explicit in the history of the Establishment Clause. Brief for the United States at 6.

² In its brief on the merits, the government states that "heightened sensitivity may be warranted when evaluating the factors described above [classroom setting]." The government, however, states that "no special rule for children is justified in the setting of a public school graduation." Brief for United States at 26-27.

the indirect coercive pressure and symbolic impact that a student experiences when an act of religious worship is brought directly into a public school function at which graduates are the focus of attention.³

It is true that in *Marsh* this Court observed that there had been an unbroken practice for legislative prayers for two centuries. This Court concluded that "there is no real threat 'while this Court sits.'" *Id.* at 795. In this case, however, we are not dealing simply with adult legislators elected presumably because of their ability to be independent thinkers. Rather, we are concerned with children at the conclusion of their tax-supported junior high school experience. Perhaps petitioners and the government are telling a prospective graduate that, unlike the public school classroom, he or she can stay away from what the graduate might consider an offensive experience. But this of course entirely ignores the reality that the ceremony is not designed to commemorate the community's religious heritage but rather the graduate's scholastic accomplishments. It is an event where peer and parental pressure merge, thus making the election to participate or not as an honored person in the celebration a difficult and perhaps traumatic experience for the student.⁴

II. THE CONSTITUTIONALITY OF INCLUDING RELIGIOUS WORSHIP AS A PART OF A PUBLIC SCHOOL-CONDUCTED ACTIVITY IS CONTROLLED BY THE PRE-LEMON CASES OF *ENGEL* AND *SCHEMPP*.

It is respectfully submitted that this case does not fall within the narrow exception to this Court's holdings that religious exercises should not be part of official public

³ Whether a child would or would not feel coerced is subjective, and the use of a coercion test cannot aid in preventing confusion or division in the lower courts.

⁴ Once the principle is established that a student can be subject to worship activity at a graduation, it will be impossible to argue over the degree of sectarianism or the content of the prayers. At one graduation, the program may be as innocuous as the Rabbi's here. At another graduation, the prayer may be pointedly sectarian.

school programs. *Amici* believe that the resolution of this case is not governed by *Marsh*, but rather, by two cases preceding this Court's *Lemon* decision. In *Engel v. Vitale*, 370 U.S. 421 (1962), this Court found unconstitutional the required daily recitation of what to some would seem to be a rather innocuous prayer devised, written, and mandated by the New York State Board of Regents. Petitioners and the government here suggest that there is really no violation of the no-establishment principles of the First Amendment since Rabbi Gutterman's invocation and benediction with their reference to God in no way compelled the non-adherents attending the graduation ceremony to change their beliefs. But, of course, exactly the same argument could have been appropriately made as to the Regent's prayer in *Engel*.

At least the Regent's prayer was prewritten, sanitized, and free of surprises. In the case of graduation prayers, however, either the clergy would have to be precensored or students and parents would have to await the predilection of the clergyperson who was selected to find out in what way, offensively or non-offensively, he wished to celebrate the community's religious traditions.⁵

Engel was decided by this Court almost 30 years ago over the sole dissent of one justice and represents established law.⁶ Important to our consideration is the fact that *Engel* was a case not involving financial aid to parochial schools, but rather religious exercises conducted for public school students. It was *Engel*, not *Lemon*, that established

⁵ The government does not choose to suggest whether it views graduation prayers as only constitutional if they are rotated among the clergy. We are left to speculate as to what the government's view would be if the same denomination's clergy were used year-after-year within a community where the vast majority were members of one faith or if clergy of religions such as Islam, Hinduism, or Buddhism somehow were miraculously spared invitations to present prayers.

⁶ This is not a case such as *Harmelin v. Michigan*, 59 U.S.L.W. 4839, 4841 (U.S. Jan. 27, 1991), wherein Justice Scalia suggested that *stare decisis* should be less rigidly applied where a decision is recent and represents the opinion of a closely divided Court.

the position exactly opposite that now advanced in the Solicitor General's brief. In *Engel*, 370 U.S. at 430, the Court, in discussing the reach of the Establishment and Free Exercise Clauses of the First Amendment, stated: "Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachments upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion"

Engel, therefore, does not support the Solicitor General's analysis. Likewise, again pre-*Lemon*, the Court in *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), also reiterated the *Engel* conclusion that the Establishment Clause does not depend upon the finding of coercion. *Id.* at 221.

In *Schempp* this Court was concerned with Bible reading in the public school. Justice Clark, who wrote the opinion in *Schempp*, was not ignorant of American history when concluding that Bible reading in the classroom violated the Establishment Clause. He noted that each house of Congress provided through its chaplain an opening prayer, and the sessions of the Supreme Court were declared open by the crier in a short ceremony with the final phrase "invoking the grace of God." He observed that it could be "truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are 'earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his [blessing . . .]'," citing Madison's *Memorial and Remonstrance Against Religious Assessments*. *Id.* at 213.

However, Justice Clark did not conclude that because we are a religious people, school children should be subjected to religious worship as part of official public school programs. Justice Clark acknowledged that our history was imperfect.⁷ He stated: "Nothing but the most telling of

⁷ Justice O'Connor has commented that "[h]istorical acceptance of a

personal experiences and religious persecution suffered by our forebears, . . . could have planted our belief in liberty of religious opinion any more deeply in our heritage. It is true that this liberty frequently was not realized by the colonists, but this is readily accountable by their close ties to the Mother Country. However, the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States." *Id.* at 214 (citations omitted).

III. THE DOCTRINE OF ORIGINAL INTENT DOES NOT SUPPORT OVERRULING *ENGEL*, *SCHEMP*, AND *LEMON* SO AS TO VALIDATE RELIGIOUS WORSHIP AT PUBLIC SCHOOL EVENTS.

The government in its *amicus* brief suggests that the *Lemon* test and the results of the decision below are not consistent with the original intent of the Framers of the First Amendment. Brief of United States at 7-21, 26. Professor William P. Marshall, however, has underscored the difficulty of attempting to ascertain and utilize an original intent view to scuttle approximately 30 years of judicial precedent:

Professor Harry Jones has argued that, in the interpretation of documents, constitutions, or statutes, the focus of professional and judicial attention shifts from the text of the materials to judicial precedent as the text gets older and interpretative materials accumulate. In cases that require textual interpretation, then, the grounds of decisions are derived not from text or history but from preexisting judicial interpretation.

Professors Kurland and Laycock argue, in my opinion correctly, that reliance on historic intent at best

practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause, just as historical acceptance of racial or gender based discrimination does not immunize such practices from scrutiny under the 14th Amendment." *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086, 3121 (1989).

is not a definitive guide to resolving issues under the religion clauses and at worse is simply a false god being used in some quarters to justify personal political agendas. . . .

W. Marshall, *Unprecedented Analysis and Original Intent*, 27 Wm. & Mary L. Rev. 925 (1987).

Professor Laycock demonstrates the difficulty that the "original intent" proponents have in attempting to argue that the no-establishment proscription of the First Amendment does not prevent non-preferential aid to religion. He conclusively demonstrates, by tracing the rejected drafts of the Establishment Clause, that "[t]he establishment clause actually adopted is one of the broadest versions considered by either House. It forbids not only establishments, but also any law respecting or relating to an establishment. Most important, it forbids any law respecting an establishment of 'religion.' It does not say 'a religion,' a national religion,' 'one sect or society,' or 'any particular denomination of religion.' It is religion generically that may not be established." Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 881 (1987). We believe he rightly concludes that "[i]f Congress paid any attention at all to the language it fought over, it rejected the 'no preference' view." *Id.* at 882.⁸

⁸ Professor Laycock's view is supported by other recognized authorities who demonstrate that the offered and rejected drafts of the Establishment Clause, as well as the debates, require a broad reading of the Establishment Clause and a rejection of the nonpreferential aid theory. See L. Levy, *The Establishment Clause* 75-89 (1986). Also helpful for an understanding of the original intent of the Framers is the record of the debate and the actual language of the various drafts of the Establishment Clause with a discussion on what conclusions may be properly drawn which appears in the classic work by A. Stokes, 1 *Church and State in the United States* 538-52 (1952). Stokes concluded from the language and debates that the First "Congress was not satisfied with a proposal which merely prevented an advantage to any one denomination over others as far as Church-State separation was concerned. It wished to go further." *Id.* at 546.

Professor Laycock argues that what the Framers may or may not have done is not as important as the principle they expounded. This was in part because the society in which they then lived "was so homogenous." *Id.* at 923. He notes that "[t]he United States today is more religiously diverse than anything the Framers could have imagined." *Id.* at 919.⁹

⁹ Professor Franklin Hamlin Littell has stated:

Nevertheless, Americans are considerably less homogeneous than they were two hundred years ago. At the time of the Declaration of Independence, 85 percent of the population came from the British Isles. There were then, in a population of ca. 3.8 millions with Protestant state churches in the colonies organized on the European model, ca. twenty thousand Catholics and ca. 4,000 Jews. At the Bicentennial of the republic the American religious configuration is decidedly different. Ethnic, cultural, and religious pluralism is the rule.

The largest denomination is the Roman Catholic Church with 52.8 millions. The estimate for the Jewish community is 5.9 millions. The Protestants are grouped as follows:

MAJOR CONSERVATIVE DENOMINATIONS

Lutherans, Missouri Synod—2.6 millions
Southern Baptists—14.6 millions
Mormons (LDS)—3.4 millions
Christian Churches and Churches of Christ—1.0 millions
Assemblies of God—2.1 millions

MAJOR LIBERAL AND ECUMENICAL DENOMINATIONS

American Baptists—1.6 millions
Evangelical Lutherans (ALC, ELC, & ELC Assoc.)—5.3 millions
Christian Church (Disciples)—1.1 millions
Episcopalians—2.5 millions
UCC (Congregationalists and E & R)—1.7 millions
Presbyterians—3.0 millions
Methodists (UMC)—9.2 millions

In addition, there are black churches for which reliable estimates are not available: National Baptist Convention of America (2.7 million), National Baptist Convention, Inc. (5.5 million), African Methodist Episcopal Church (1.1 million),

In *Schempp*, the Court, quoting Justice Jackson's dissent in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), stated:

"There is no answer to the proposition . . . that the effect of the religious freedom Amendment to our Constitution was to take every form or propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. . . . This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity."

Schempp, 374 U.S. at 216. Significantly in *Schempp*, this Court clearly understood that the principles advanced by the government today were contrary even then to established judicial precedent:

The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This

and African Methodist Episcopal Zion Church (940,000). Perhaps more to the point in terms of America's religious pluralism one needs to be reminded that there are in the United States an estimated 1.8 million Muslims, 800,000 Black Muslims, 500,000 Hindus,—and one state with a Buddhist plurality (Hawaii).

F. Littell, *Religious Freedom in Contemporary America*, 31 J. Church & St. 219-20 (Spring 1989).

the Free Exercise Clause guarantees. Thus, as we have seen, the two clauses may overlap. As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that *to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion*. The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasion thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. *The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.*

Id. at 222-23 (emphasis supplied).

IV. THE "EFFECTS TEST" OF *LEMON* WAS DERIVED ORIGINALLY NOT FROM A PAROCHIAL SCHOOL AID CASE AS CLAIMED BUT FROM PUBLIC SCHOOL RELIGIOUS WORSHIP CASES.

It is worth underscoring that the first two prongs of the *Lemon* test were first announced in *Schempp* in the context of religious exercises conducted in public schools, not aid to parochial schools. After announcing a two-prong test, the Court in *Schempp* then found that the religious exercises were unconstitutional:

The conclusion follows that in both cases the laws require religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners. Nor are these required exercises mitigated by the fact that individual students may absent themselves upon a parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. . . . Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, "it is proper to take alarm at the first experiment on our liberties."

Id. at 224-25 (citation omitted).

V. THE APPROPRIATE CONSTITUTIONAL REVIEW IN THIS TYPE OF CASE REQUIRES THE UTILIZATION OF THE ANALYSIS OF THIS COURT IN *SCHEMPP* AND *LEMON* AS HONED THROUGH JUDICIAL APPLICATION RESULTING IN THE ENDORSEMENT INQUIRY.

Amici believe that any missing link in the appropriate analysis of cases wherein public school students are subject to officially conducted worship, whether that be within the classroom or at a graduation ceremony, has been supplied by Justice O'Connor in her refinement of the *Lemon* test. In *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086 (1989), the majority of this Court embraced Justice O'Connor's endorsement analysis. The majority stated that "[i]n recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence." *Id.* at 3100, citing *Engel v. Vitale*, 370 U.S. 421, 436 (1962), and *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985).

In *County of Allegheny v. American Civil Liberties Union*, Justice O'Connor clearly articulated her endorse-

ment analysis. She explained that she joined the majority in *Lynch v. Donnelly*, 465 U.S. 668 (1984), on the strength of *Marsh v. Chambers*, 463 U.S. 783 (1983), as an acknowledgement of religion in American life. She, however, carefully explained that such government acknowledgements of religion were not understood as conveying an endorsement of a particular religious belief. However, she said, at the same time, "it is clear that '[g]overnment practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny.'" *County of Allegheny*, 109 S. Ct. at 3118, citing *Lynch v. Donnelly*, 465 U.S. at 694.

Justice O'Connor, further explained her endorsement analysis:

As a theoretical matter, the endorsement test captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to their standing in the political community by conveying a message "that religion or a particular religious belief is favored or preferred."

Id. at 3119, citing *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985). Sensitive to the fact that our nation has developed from a highly homogeneous to a pluralistic society, Justice O'Connor continued:

We live in a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all. If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that are outsiders or less than full members of the political community.

Id.

In a succinct statement that appears to directly reject the arguments of the government and the petitioners in this case that coercion is the central focus of concern in non-financial aid cases, Justice O'Connor stated:

An Establishment Clause standard that prohibits only "coercive" practices or overt efforts at government proselytization . . . but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community. Thus, this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis.

Id. Justice O'Connor concluded that "any Establishment Clause test limited to 'direct coercion' clearly would fail to account for forms of '[s]ymbolic recognition or accommodation of religious faith' that may violate the Establishment Clause." *Id.* at 3120.

VI. THE TEST SUGGESTED BY THE GOVERNMENT IS NEITHER HELPFUL NOR CONSISTENT WITH THE PRINCIPLE OF INDIVIDUAL RELIGIOUS FREEDOM EMBRACED IN THE RELIGION CLAUSES.

Amici agree with Justice O'Connor that if any modification is required of the *Lemon* test, it will not be accomplished through the government's coercion analysis but rather through the endorsement test which, as stated by Justice O'Connor, "is capable of consistent application." *Id.*¹⁰

¹⁰ Dean Joseph Richard Hurt argues that the endorsement approach "better captures the essence of establishment Clause designs than prior articulations put forth by members of the Court and legal scholars." J. Hurt, *The Use of Endorsement for Establishment Clause Analysis—The Key to a New Consensus*, 8 Miss. C. L. Rev. 1, 30 (Fall 1987). He further contends that "[i]ts sweep, therefore, is sufficiently broad to protect the major values upon which the Court has been able to agree." *Id.*

It is clear that even the Solicitor General's suggested test falls far short of any appropriate or helpful analysis of Establishment Clause jurisprudence.¹¹ The erection of a large Latin cross, a Menorah, or a symbol of an Eastern religion at a graduation exercise could not be claimed to be specifically coercive, yet it certainly would violate the Establishment Clause as understood by most of the people of this country. Justice Kennedy, for instance, seems to acknowledge that at some point symbolic official recognition of religion generally or sectarian worship specifically may violate the Establishment Clause without coercion. According to Justice Kennedy, the Establishment Clause would forbid the city to permit the permanent erection of a large Latin cross on the roof of city hall. *Id.* at 3137. Justice Kennedy further acknowledges an eager proselytizer may use religious symbols for his own ends. *Id.* at 3146.¹² He also correctly states that "[t]he ability of the organized community to recognize and accommodate religion in a society with a pervasive public sector requires diligent observance of the border between accommodation and establishment." *Id.* at 3136.

Amici believe that the government's attempt to validate religious exercises as part of the graduation exercises of junior high school students completing their required class time in a public school crosses the constitutional borderline of the proscriptions of the Establishment Clause and the values it seeks to protect. We further believe that *Engel*, *Schempp*, and Justice O'Connor's endorsement analysis, all

¹¹ Professor Carl H. Esbeck has pointed out that "[r]educing the establishment clause to the prevention of coercion of religiously based conscience renders the clause's reach coextensive with that of the free exercise clause," and therefore makes it redundant. C. Esbeck, *The Lemon Test: Should It be Retained, Reformulated or Rejected?*, 4 Notre Dame L. J. 513, 544 (1990).

¹² Under Justice Kennedy's suggested analysis, would the repeated use of the same clergy of the dominant faith within a community praying sectarian prayers or urging the students to give their hearts to Jesus Christ or the celebration of the Mass, be construed as unconstitutional?

of which are soundly grounded in judicial precedent, require that this Court sustain the decisions of the courts below.

VII. CALLING THE SCHOOL SPONSORED ACTIVITY "CEREMONIAL" DOES NOT ALTER THE CONSTITUTIONAL INQUIRY.

Petitioners and the government seek to escape the holdings of this Court as to religious exercises involving public school students by seizing upon the term "ceremonial." The logic of that argument has been exploded by Professor Richard H. Jones who explained:

Labeling some activity "merely ceremonial" or "commonplace ritual" does not dispose of the issue of whether the activity is religious. Courts do not appear to understand why these practices are so commonplace. Ritual is not unimportant because it is only part of the introduction and conclusion of a special occasion rather than part of the business of that occasion. Ritual cannot be dismissed as merely solemnizing a secular occasion—one religious objective of ritual is the symbolic marking of the transition to and from special occasions. High school graduation, which marks a transition in the life of the student to adulthood, is an example of an occasion in the life of a community in which prayers and other ritualized formalities are expected. However, courts have upheld invocation of God and public school graduation ceremonies without discussing the importance of ritual in human lives and ignoring the religious nature of rituals.

R. Jones, *"In God We Trust" and the Establishment Clause*, 31 J. Church & St. 381, 390-91 (Autumn 1989). Professor Jones argues that "the issue is whether the symbolic invocations of God in governmental actions are religious in nature, not whether they are 'cultural' or 'ceremonial.' And since they do relate directly to our fundamental transcendental values and beliefs the conclusions must be that they are indeed religious." *Id.* at 391.

VIII. CLAIMING THAT THE WORSHIP PART OF A PUBLIC SCHOOL EVENT IS MERELY AN "ACCOMMODATION" OF RELIGION DISTORTS ITS ACCEPTED CONSTITUTIONAL MEANING AND REPRESENTS A VIOLATION OF RELIGIOUS LIBERTY PRINCIPLES.

Professor Jones, echoing the concept expressed in Justice O'Connor's endorsement test, also demonstrates that religious exercises are not a neutral "accommodation" of religion in the public sphere as argued by petitioners and the government:¹³

They involve reference to a particular type of religion—theism. This is neutral to Christianity, Judaism, and other theistic traditions, but not to all religious traditions. The effect on non-theistic minorities who take religion seriously must be to create a feeling of an inferior status: "Only those whose beliefs are singled out for recognition will think that public sphere accommodations promote conscientious autonomy and free exercise values; others will instead be given the impression that nonadherence to the preferred creed means being less than a full member of the political community."

Id. at 398-99.

Equally offensive is the impact that a secularized religion can have on those who may not be a part of a minority religious group. Professor Jones further argues:

In the words of Justice Brennan, "Religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." Employing religion as an "engine of civil policy" is, as James

¹³ Justice O'Connor has stated that "the endorsement standards recognize that the religious liberty so precious to the citizens who make up our diverse country is protected, not impeded, when government avoids endorsing religion or favoring particular beliefs over others." *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. at 3121. She is correct in her observation that "the government can acknowledge the role of religion in our society in numerous ways that do not amount to an endorsement." *Id.*

Madison said, an "unhallowed perversion of the means of salvation." Any use of the symbol "God" in civil functions may appear to be a "trivialization and degradation" of a sacred symbol. Secular uses of religious symbols (e.g., promoting patriotism) would be especially objectionable. From this perspective, the only legitimate objective of the God-references is to voice in the public sphere Americans' religious faith.

Id. at 415.

Of course, all religious groups and individuals themselves have the prerogative to utilize the public market place to proselytize and to otherwise celebrate their religious heritage so long as it does not carry the imprimatur of the state.

IX. THE CORE PURPOSE OF THE BILL OF RIGHTS, INCLUDING FIRST AMENDMENT PROSCRIPTIONS, WAS TO PROTECT THE INDIVIDUAL FROM THE TYRANNY OF THE MAJORITY AND TO EXTEND PERSONAL FREEDOM.

The Constitution was cautiously designed with built-in checks and balances to prevent the control of government from being placed in the hands of an elected monarch or an imperial president. But this safeguard was not enough. The founders of our country were no more willing to permit religious liberty and other basic rights to remain within the ultimate control of the ballot box or governmental functionaries than they were to let these vital matters touching personal conscience to depend upon a succession of monarchs. They insisted that fundamental personal rights be specifically protected by a Bill of Rights. As the Supreme Court stated in *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943):

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.

In a letter to James Madison on October 17, 1788, Thomas Jefferson objected to Madison's opinion that a Bill of Rights would be ineffective. Jefferson suggested that Madison omitted to mention "one [argument] which has great weight . . . , the legal check which [a Bill of Rights] puts in the hands of the judiciary." In a December 20, 1789, letter to Madison, Jefferson wrote: "I will now add what I do not like. First, the omission of a bill of Rights providing clearly and without aid of sophisms for religious freedom" 12 *The Papers of Thomas Jefferson* 438-42 (J. P. Boyd ed. 1958). Jefferson's letters, no doubt, led Madison to emphasize when he presented his draft of the Bill of the Rights to Congress that the courts would enforce the limitations of the proposed amendments. B. Schwartz, 1 *The Bill of Rights: A Documentary History* 593 (1971).¹⁴

¹⁴ *Amici* notes that the Chief Justice, dissenting in *Wallace v. Jaffree*, 472 U.S. 38, 92-104 (1985), minimized Jefferson's input concerning the principles embodied in the First Amendment. It has been claimed, however, by one commentator:

Rehnquist's performance here [his dissent in *Wallace v. Jaffree*] left much to be desired. Inconsistently, he attempted to discredit Jefferson as an authority on the meaning of the First Amendment but later nullified that effort by citing two of Jefferson's actions that seemed useful for his own interpretation. In doing the latter he ignored (and as a supreme court justice was in no position to share) Jefferson's complex theory of how the three independent but coordinate branches of the federal government were to determine constitutionality. Nor did Rehnquist point out that his quotation from the Kaskaskai treaty was really an independent nation's stipulation of the use to be made on its own land of its compensation, or that the trust endowment was congressional confirmation of a commitment made before the inauguration of the Constitution. Rehnquist compounded the inconsistency further by citing false history, for, contrary to his contention, Jefferson actually was in the United States throughout the ratification process: his boat sighted land on 13 November 1789, a week before the first state, New Jersey, voted to ratify the Bill of Rights on 20 November. Nor was Rehnquist right to dismiss the Danbury Baptist letter as "a short note of courtesy," for

As professor Douglas Laycock has stated:

When he introduced the Bill of Rights, Madison explained that even limited powers could be abused, that Congress had discretion as to means, and that a bill of rights could protect against abusive measures that might otherwise be necessary and proper means of implementing delegated powers.

D. Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 907 (1987).¹⁵

Professor Philip Kurland, in describing the Bill of Rights, commented:

The Bill of Rights was largely a series of restraints against majority imposition on minorities, written mostly in terms of assuring procedures that would guarantee the rule of law, that the arbitrary whims of officials would not be invoked. The concern of the Bill of Rights was freedom of individuals. . . .

P. Kurland, *The Religion Clauses and the Burger Court*, 34 Cath. U. L. Rev. 1, 5 (Fall 1984). Thus, as Professor

(as the opening paragraph of this article demonstrates) Jefferson deliberately used the letter to inculcate a political lesson condemning "the alliance of Church and State."

Healey, *Thomas Jefferson's "Wall": Absolute or Serpentine?*, 30 J. Church & St. 441, 459 (Autumn 1988).

¹⁵ Professor Alexander Meiklejohn stated that the First Amendment represents our forefathers' victory for "the unlimited right of 'Religious and Political Freedom.'" A. Meiklejohn, *What Does the First Amendment Mean?*, 20 U. Chi. L. Rev. 461, 464 (1953). Contrary to the current philosophy urged upon this Court, "[u]nder the new Constitution, the people, now a corporate body of self-governing citizens, forbade their legislative agents to use, for the protection of the nation, any limitation of the religious or political freedom of the people from whom their legislative authority was derived." *Id.* Meiklejohn argues from Madison's and Hamilton's writings in the "Federalist" that "the citizens, as the sovereign power, must be kept free from any dependence on their representatives." *Id.* at 469. He argues that "it is the legislature which, in actual fact, chiefly threatens to usurp the authority of the people." *Id.* at 469-70.

Norman Dorsen observed, "it is the federal judiciary's special province, relatively insulated as it is from majoritarian political control . . . to protect those who adhere to minority religions or who do not profess a religion." N. Dorsen, *The Religion Clauses and Nonbelievers*, 27 Wm. & Mary L. Rev. 863, 869 (1987).

Accordingly, although the government of the United States under its new Constitution was to be governed by a representative government generally exercising authority by majoritarian rule, the Bill of Rights was an anti-majoritarian instrument designed to protect the individual from the tyranny of the majority and their elected executive and legislative representatives. But the Bill of Rights and its First Amendment also contained other important philosophical ingredients. As Professor Roger Finke observed, the First Amendment symbolized the dramatic shift from religious establishment to religious freedom. Finke, *Religious Deregulation: Origins and Consequences*, 32 J. Church & St. 609 (Summer 1990). Professor Finke observed that the First Amendment severed the close ties between church and state in the United States. He argued too that the no-Establishment Clause of the First Amendment eliminated the concept of religious toleration and redefined the boundaries within which religion operated:

The new boundaries supported a religious market where competition was not only endured, it was encouraged. With the new rules of law, upstart sects and new religions were not only given a right to exist (toleration), they were given "equal" rights; and the once privileged religious establishments lost the legislative and financial support of the state. By denying the establishment of any religion, and granting the free exercise of religion to all, the state could no longer support regulation that denied privileges to or imposed sanctions on specific religious organizations—or their members. The state was denied the privilege, and freed of the obligation, of regulating religion. The result was an unregulated religious economy.

These drastic changes in the support and regulation of religion led to many dire forecasts on the future of the church. By the early nineteenth century, however, it became evident that the local church had not only survived this decline in regulation, it has prospered. But why? What were the consequences of deregulating religion and why did religion prosper with less support from the state?

The thesis of this essay is that religious deregulation has had powerful effects on the religion of the people, their churches, and the very operation of the religious market since the eighteenth century. Indeed, religious deregulation helps to explain the rapid growth of populist religions in the early nineteenth century as well as features attributed to modern religious culture. Contemporary issues such as religious individualism, pluralism, and the marketing of religion, can be understood as natural consequences of religious deregulation. . . .

Id. at 609-10.

Professor Finke claimed, however, that the First Amendment was designed to sever the ties between church and state:

As geographic size, economic interests, and increasing religious diversity pushed the colonies toward an increased acceptance of religious toleration, an unlikely alliance between the rationalists and the evangelicals pulled the colonies toward complete religious freedom. Despite the disparity in the background and training of the rationalists and evangelicals, their arguments for religious liberties could sound remarkably similar. . . . The alliance between the rationalists and evangelicals was tenuous, but both groups could agree on the essential points: citizenship should not determine church membership and the ties between church and state should be severed.

Id. at 612-13.

Professor Finke argued that at the adoption of the First Amendment "[d]e facto establishments still existed, and many states still refused to give religious liberties to Roman Catholics, Jews, and 'infidels,' but the regulation of religion was in sharp decline. The religious market was increasingly becoming an unregulated market, a market that would have powerful consequences on the organization and practice of religion in America." *Id.* at 613.

In essence, petitioners here and a number of *amici* supporting the position of petitioners apparently long to return to a less pluralistic and less deregulated religious society. They seek to return to the "good ole days" by a narrow construction of the Establishment Clause.

The thread that runs through the brief of the petitioner and most of the briefs of the supporting *amici* give comfort to those who practice religion in a way consistent with the views of the majority, at least the political majority within a given community. In truth, the religious liberty claim asserted by petitioners and supporting *amici* may be correctly described as community-by-community "religious toleration" and smacks of the worst, not the best, of our heritage.

X. THROUGHOUT THE HISTORY OF OUR NATION THERE HAS BEEN A FORCE TO IMPRESS THE IMPRIMATUR OF THE STATE ON THE RELIGIOUS VIEWS OF THE MAJORITY AT THE EXPENSE OF THE INDIVIDUAL.

The attempt of some to use governmental means to accomplish religious and sectarian ends has been a force in this nation from its beginning. It is no surprise that it continues to surface from time-to-time, as it has at this very time. Professor Carol Weisbrod, in describing this phenomena, stated:

Historian Morton Borden has recently noted that many early federalists "envisioned the American future as a federation of Christian States in which the majority churches would be supported by local compulsory taxation, and the state governments—where

real power would reside—would be controlled by Protestants only.

See Weisbrod, *On Evidences and Intentions: "The More Proof, The More Doubt,"* 18 Conn. L. Rev. 803, 820 (Summer 1986). Professor Weisbrod also noted that "some nineteenth century figures who are considered experts in relation to the religion clauses of the federal Constitution," also, contrary to Jefferson's view, continued to argue that a "Christian commonwealth" had been formed at the adoption of our Constitution. *Id.* at 821. She stated:

Justice Joseph Story declared that the nation was Christian in the sense that the truth of Christianity was admitted. When he construed the federal Constitution, Story based his view on the assumption that the essential state policy was support for general Christianity. . . . In Story's view, "[t]he real object of the [first] amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.

Id. at 822. Justice Story's view apparently is reflected in the dissent of the Chief Justice in *Wallace v. Jaffree*, 472 U.S. at 104. Thus, the endless struggle between Jefferson's and Madison's views of religious freedom and Story's Christian nation concept continues.

XI. TODAY THE RIGHT OF THE INDIVIDUAL IN MATTERS OF RELIGION IS AGAIN THREATENED BY THIS ATTEMPT TO NARROWLY CONSTRUE THE PROTECTIONS PROVIDED BY THE RELIGION CLAUSES.

Even Professor Michael W. McConnell, who advances the coercion test and is liberally cited by petitioners and the various *amici* filing in support of the petitioners, takes issue with the construction of the Establishment Clause as argued in the *Jaffree* dissent. He states:

According to Justice Rehnquist, the establishment clause "forbade establishment of a national religion, and forbade preference among religious sects or denominations"—nothing more. Despite having quoted Madison's words, Justice Rehnquist failed to mention that under the first amendment, Congress cannot "compel men to worship God in any manner contrary to their conscience" or compel them to "conform" to any religion not of their own choosing.

M. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933, 936 (1987).

One has a difficult time squaring the enlightened concepts embraced in the Bill of Rights with a narrow reading of the Religion Clauses of the First Amendment. A reading of the *amicus* brief filed by the United States clearly reveals that when the government suggests abandoning the *Lemon* test and utilizing a "liberty-focused inquiry," it really means liberty for the majority religious view within a community.

XII. THE CRABBED VIEW OF THE ESTABLISHMENT CLAUSE ADVANCED BY PETITIONERS AND THE GOVERNMENT DISTORTS THE ROLES OF THE CHURCH AND THE STATE AS TO THEIR RESPECTIVE INVOLVEMENT IN PUBLIC LIFE AND IMPACTS ON THE INDIVIDUAL.

Contrary to the suggestions of petitioners, this Court has not been insensitive to the religious interests of the community. In *Abington School District v. Schempp*, 374 U.S. 203, 226 (1963), this Court stated:

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard.

Justice Brennan, in his concurring opinion in *Schempp*, however, carefully platted the judicial boundary applicable to this case:

Attendance at the public schools has never been compulsory; parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. The relationship of the Establishment Clause of the First Amendment to the public school system is preeminently that of preserving such a choice to the individual parent, rather than vesting it in the majority of voters to each State or school district. . . . In my judgment the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures. The choice between these very different forms of education is one—very much like the choice of whether or not to worship—which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election.

Id. at 242.

If one accepts Justice Brennan's concept that the state may not limit the liberty of the private school and the carrying out of its role as it attempts to inculcate religious and other values, then conversely public education must be equally free from sectarian pressures.¹⁶

The point which has been missed by the petitioners and all the *amici* filing in their support is that we are not talking merely of speech. We are speaking of worship—perhaps one of the most sacred of all religious events—

¹⁶ Justice O'Connor argues that "[j]ust as government may not favor particular religious beliefs over others, 'government may not favor religious belief over disbelief.'" *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. at 3123.

people directly calling upon God. It is ironic that today petitioners and those supporting them should not understand the distinction between a speech given at a graduation exercise of a junior high school and an act of religious worship whether it be conducted in a classroom, an auditorium at graduation, or a church or synagogue.¹⁷

Amici contend that with the new high in religious pluralism, the concept of religious liberty should not be turned on its head by embracing a distorted view of religious liberty advanced by petitioners and the government. Justice O'Connor has clearly and correctly articulated the true spirit of the non-establishment proscription of the First Amendment when she stated:

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways: One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. . . . The second and more direct

¹⁷ Justice White, in his dissent in *Widmar v. Vincent*, 454 U.S. 263, 284 (1981), argues against the view that religious worship is no different from any other variety of protected speech. He logically asserts that if this were so "the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech." Justice White further explained that "[t]alk about religion and about religious beliefs . . . is not the same as religious services of worship." *Id.* at 284 n.2.

Similarly, Justice O'Connor, writing for this Court in *Board of Educ. of Westside Community Schools v. Mergens*, 110 S. Ct. 2356, 2372 (1990), stated that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." A school graduation will certainly be viewed as a governmentally sponsored event with those invited to be there at the invitation of the public school system.

infringement is government endorsement or disapproval of religion. *Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.* Disapproval sends the opposite message.

Lynch v. Donnelly, 465 U.S. at 687-88 (O'Connor, J., concurring) (emphasis supplied) (citations omitted).

XIII. PETITIONERS AND THE GOVERNMENT WOULD HAVE THIS COURT ABANDON DECADES OF JUDICIAL PRECEDENT AND REPLACE IT WITH A NEW RESTRICTIVE AND UNTRIED TEST TO APPLY TO ASSERTED VIOLATIONS OF THE NON-ESTABLISHMENT PROVISION OF THE FIRST AMENDMENT.

Petitioners and the government do not seek merely to have this Court interpret the facts and apply established constitutional principles. Rather, they make a frontal assault upon accepted judicial precedent established painstakingly by this and other courts over decades.¹⁸ The havoc they seek to work can only result in chaos in Establishment Clause jurisprudence.

Professor William Marshall persuasively argues:

Nevertheless, before overruling an entire jurisprudence wholesale, it is advisable to inquire into both the social effects inherent in such a displacement and the jurisprudential need for it. This inquiry, moreover, is particularly appropriate when the result of disavowing the former jurisprudence would be as radical as the result advocated by those who suggest a constitutional analysis based on so-called "original intent." Indeed,

¹⁸ The importance of *stare decisis*, even in constitutional cases, was noted by Chief Justice Rehnquist in *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468 (1987), in which he commented that by "circumspect observance" of the principle of *stare decisis* "the wisdom of this Court as an institution transcending the moment can alone be brought to bear on the difficult problems that confront us." *Id.* at 479.

a review of constitutional law suggests that overruling an entire jurisprudence on the grounds proposed by the Justice Department would be unparalleled in its extremism. . . .

Marshall, *Unprecedented Analysis and Original Intent*, 27 Wm. & Mary L. Rev. at 926. Professor Marshall also claims that "the megaton explosion . . . that did envelope *Lynch v. Donnelly* would be a hush compared to the conflagration that would occur if the Court constructed an entirely new direction based on one advocate's highly debatable claim of history 'properly understood.'" *Id.* at 927.

The government admits that the appropriate analysis of the non-establishment proscriptions of the First Amendment should be "limned through case-by-case adjudication." Brief of the United States at 24. Yet, this is exactly what this Court and others have been doing for over three decades.¹⁹ Attached as Appendix A to this brief is a comprehensive listing of hundreds of federal and state court decisions applying the *Lemon* test in Establishment Clause cases. Included also in Appendix B are the cases applying Justice O'Connor's helpful endorsement analysis.

The revisiting of all the issues addressed in these cases with a new test will add a tremendous burden to an already overburdened judicial system. More importantly it will jettison the judicial precedent in this whole area and make it difficult, if not impossible, to advise citizens, churches, governmental agencies, and others on how to

¹⁹ Justice White sagely acknowledges that "Establishment Clause cases are not easy; they stir deep feeling; and we are divided among ourselves, perhaps reflecting the different views of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutists approaches at either end of the range of possible outcomes." *Committee for Public Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980). The Chief Justice has stated "that the Establishment Clause presents especially difficult questions of interpretation and application." *Mueller v. Allen*, 463 U.S. 388, 392 (1983). What petitioners and the government seek is the rejection of the principle of *stare decisis* and the utilization of an absolutist approach to the expense of personal religious freedom.

react when Establishment Clause questions arise. In addition, the *Lemon* test as it has evolved over years of case-by-case application to specific facts and programs has not resulted in a predetermined conclusion to strike down governmental acts. Finally, the result with a new and greater unpredictability in the area of church-state relations can only cause greater discord and divisiveness along religious lines.

Perhaps even more problematic than ignoring judicial precedent and creating an area of constitutional uncertainty, we are told by the Solicitor General that the test advanced by him as the substitute for *Lemon* and as modified by the endorsement analysis will not "necessarily make the requisite inquiry less difficult." Brief of United States in Support of Pet. for Cert. at 18.²⁰

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the First Circuit should be sustained.

²⁰ Professor Esbeck argues for the retention of the *Lemon* test because, to adopt the suggested alternatives "would work a sea of change in current legal doctrine" and would leave the future as a question mark. Esbeck, *supra*, at 548.

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APPENDIX

APPENDIX A
ESTABLISHMENT CLAUSE CASES USING THE LEMON
TEST

This appendix lists cases located by Westlaw searches (Allfeds and Allstate: Lemon /p test** testing /p establish! /p first-amendment (secular /5 legislative /5 purpose) (primary /5 effect) inhibi! religiou!) in April and July and that were in print as of July 1, 1991.

Supreme Court Cases

CASE	CITATIONS	CHALLENGED MATTER	VIOLATIVE OF ESTABLISHMENT CLAUSE
Board of Education of Westside Community v. Mergens	495 U.S. __, 110 S. Ct. 2356, 110 L.Ed.2d 191 (1990)	Equal Access to Student Christian club under Equal Access Act	No
Jimmy Swaggart Ministries v. Board of Equalization	493 U.S. __, 110 S. Ct. 688, 107 L.Ed.2d 796 (1990)	Religious organization seeking refund of sales and use taxes paid under protest	No
Texas Monthly, Inc. v. Bullock	489 U.S. 1, 109 S. Ct. 890, 103 L.Ed.2d 1 (1989)	Sales tax exemption provided by state statute for religious periodicals	Yes
Bowen v. Kendrick	487 U.S. 589, 108 S. Ct. 1, 101 L.Ed.2d 520 (1988)	Adolescent Family Act (remanded to determine if violative as applied)	No

Karcher v. May	484 U.S. 72, 108 S. Ct. 388, 98 L.Ed.2d 327 (1987)	State statute which provided for 1 minute of silence at beginning of school day	Moot
Corporation of Presiding Bishop v. Amos	483 U.S. 327, 107 S. Ct. 2862, 97 L.Ed.2d 273 (1987)	Title VII as applied to religious discrimination in employment to nonprofit activities of religious organization	No
Edwards v. Aguillard	482 U.S. 578, 107 S. Ct. 2573, 96 L.Ed.2d 510 (1987)	Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act	Yes
Witters v. Washington Department of Services for the Blind	474 U.S. 290, 106 S. Ct. 748, 88 L.Ed.2d 846 (1986)	Financial vocational assistance for blind student pursuing bible studies degree at Bible College	No

School District of City of Grand Rapids v. Ball	473 U.S. 373, 105 S. Ct. 3216, 87 L.Ed.2d 267 (1985)	Shared time and community education programs provided non-public school students at public expense in nonpublic schools	Yes
Aguilar v. Felton	473 U.S. 402, 105 S. Ct. 3232, 87 L.Ed.2d 290 (1985)	Use of public funds to finance programs sending public school teachers and other professionals to religious schools to provide remedial instruction	Yes
Estate of Thorton v. Caldor Inc.	472 U.S. 703, 105 S. Ct. 2914, 86 L.Ed.2d 557 (1985)	State statute which provides Sabbath observes with an absolute right not to work on their chosen Sabbath	Yes
Wallace v. Jaffree	472 U.S. 38, 105 S. Ct. 2479, 86 L.Ed.2d 29 (1985)	State statute authorizing a daily period of silence in public schools for meditation or voluntary prayer	Yes

Tony & Susan Alamo Foundation v. Secretary of Labor	471 U.S. 290, 105 S. Ct. 1953, 85 L.Ed.2d 278 (1985)	Application of No Fair Labor Act to non-profit religious organization	No
Lynch v. Donnelly	465 U.S. 668, 104 S. Ct. 1355, 79 L.Ed.2d 604 (1984)	Nativity Scene included in Christmas display	No
Mueller v. Allen	463 U.S. 388, 103 S. Ct. 3062, 77 L.Ed.2d 721 (1983)	Tax deduction for expenses incurred in sending children to parochial schools (i.e. tuition, textbooks, transportation)	No
Larkins v. Grendel's Den, Inc.	459 U.S. 116, 103 S. Ct. 505, 74 L.Ed.2d 297 (1982)	State statute which vests governing bodies of churches and schools with the power to veto applications for liquor licenses within 500 feet radius of school or church	Yes

Larson v. Valente	456 U.S. 228, 102 S. Ct. 1673, 72 L.Ed.2d 624 (1982)	State statute requiring registration and reporting requirements only upon religious organizations that solicit 50% funds from nonmembers	Yes (Though the Court stated it did not use the Lemon Test to arrive at its decision, the Court discussed each prong of the Lemon Test)
Stone v. Graham	449 U.S. 39, 101 S. Ct. 192, 66 L.Ed.2d 831 (1980)	State statute requiring posting of the Ten Commandments on walls of each public school classroom	Yes
Committee for Public Education and Religious Liberty v. Regan	444 U.S. 646, 100 S. Ct. 840, 63 L.Ed.2d 94 (1980)	Statute authorizing the use of public funds to reimburse church sponsored and secular non-public schools for performing various testing and reporting services mandated by the state.	No
NLRB v. Catholic Bishop of Chicago	440 U.S. 490, 99 S. Ct. 1313, 59 L.Ed.2d 533 (1979)	Jurisdiction of NLRB over lay faculty at catholic school	Yes

McDaniel v. Paty	435 U.S. 618, 98 S. Ct. 1322, 55 L.Ed.2d 593 (1978)	Disqualification of candidate for delegate to Tennessee constitutional convention because he was a minister	Yes
New York v. Cathedral Academy	434 U.S. 125, 98 S. Ct. 340, 54 L.Ed.2d 346 (1977)	State statute authorizing reimbursement to nonpublic schools for state mandated record keeping and testing programs	Yes
Wolman v. Walter	433 U.S. 229, 97 S. Ct. 2593, 53 L.Ed.2d 714 (1977)	Expenditures of public funds to provide aid to students of nonpublic elementary and secondary schools	
		1. For purchase of secular textbooks, standardized testing and scoring service	No
		2. For instructional materials and equipment and transportation for field trips	Yes

Roemer v. Board of Public Works	426 U.S. 736, 96 S. Ct. 2337, 49 L.Ed.2d 179 (1976)	Public aid in form of non-categorical grants to eligible colleges and universities	No (as long as nonsecular in use)
Meek v. Pittenger	421 U.S. 349, 95 S. Ct. 1753, 44 L.Ed.2d 217 (1975)	State statute providing for state expenditures in nonpublic schools.	
		1. Textbook loan program	No
		2. Instructional equipment, materials and auxiliary services	Yes
Committee for Public Education and Religious Liberty v. Nyquist	413 U.S. 756, 93 S. Ct. 2955, 37 L.Ed.2d 923 (1973)	Aid to nonpublic schools	Yes
Hunt v. McNair	413 U.S. 734, 93 S. Ct. 2868, 37 L.Ed.2d 923 (1973)	State statutory scheme for aiding colleges by issuing revenue bonds for projects (excluding facilities for sectarian study or religious worship)	No

Levitt v. Committee for Public Education and Religious Liberty	413 U.S. 472, 93 S. Ct. 2814, 37 L.Ed.2d 736 (1973)	State statute providing for the making of certain payments of public funds to nonpublic schools	Yes
Tilton v. Richardson	403 U.S. 672, 91 S. Ct. 2091 (1971)	Higher Education Facilities Act	No—except provision that limits recipients' obligation to refrain from using federally financed facilities for sectarian instruction or religious worship to 20 years

FEDERAL COURTS OF APPEALS

Goodall v. Stafford County School Board	930 F.2d 363 (4th Cir. 1991)	Public school board refused to provide deaf child with cued speech interpreter at private religious school	No
Cammack v. Waihee	932 F.2d 765 (9th Cir. 1991)	State statute declaring Good Friday a legal holiday	No

Scharon v. St. Luke's Episcopal Presbyterian Hospitals	929 F.2d 360 (8th Cir. 1991)	Applying Title VII and the Age Discrimination law in suit brought by priest against church affiliated hospital	Yes
Harris v. City of Zion	927 F.2d 1401 (7th Cir. 1991)	Elementary school directives: 1. Removal of religious books from class library 2. Prohibit teacher from reading bible during school hours and keeping bible on his desk 3. Removal of bible from school library	No No Yes
Salvation Army v. Department of Community Affairs	919 F.2d 1476 (3d Cir. 1990)	Exemption to state statute regulating boarding houses	Yes (Remanded)
South Ridge Baptist Church v. Industrial Commission of Ohio	911 F.2d 1203 (6th Cir. 1990)	Statute requiring church pay into worker's compensation fund for all employees except ministers	No

Intercommunity Center for Justice and Peace v. Immigration and Naturalization Service	910 F.2d 42 (2d Cir. 1990)	Immigration Reform and Control Act as applied to religious organizations whose members believe in employing needy	No
Weisman v. Lee	908 F.2d 1090 (1st Cir. 1990)	Inclusion of invocations and benedictions in form of prayer in promotion and graduation of city public schools.	Yes
Gregoire v. Centennial School District	907 F.2d 1366 (3d Cir. 1990)	Use of high school auditorium by religious organizations	No
Dole v. Shenandoah Baptist Church	899 F.2d 1389 (4th Cir. 1990)	Fair Labor Standards Act as applied to church operated schools and employees	No
ACLU v. Wilkinson	895 F.2d 1098 (6th Cir. 1990)	Construction and use of biblical age stable on public grounds of state capital building to be used as a stage	No as long as all groups allowed to use and city posts notice stating not supported by public funds or an endorsement of religion.

Smith v. County of Albemarle	895 F.2d 953 (4th Cir. 1990)	Erection of nativity scene on front lawn of county office building	Yes
NAACP v. Hunt	891 F.2d 1555 (11th Cir. 1990)	Flying of the Confederate flag over state capital	No
Clayton v. Place	884 F.2d 376 (8th Cir. 1989)	School district policy prohibiting dancing	No
Foremaster v. City of St. George	882 F.2d 1485 (10th Cir. 1989)	1. Construction of city logo depicting Mormon temple 2. Free Electricity to temple by city utility	Remanded to determine primary effect Yes
Mergens v. Board of Education of Westside	867 F.2d 1076 (8th Cir. 1989)	Equal Access Act as applied to the formation of Christian Bible Study Club at high school	No
Garnett v. Renton School District	874 F.2d 608 (9th Cir. 1989) <i>amending</i> 865 F.2d 1121 (9th Cir. 1989)	High school student religious groups to meet in classrooms prior to start of school	Yes

Mather v. Village of Mundelein	864 F.2d 1291 (7th Cir. 1989)	Erection of creche in front of village hall as part of larger secular display	No
Jager v. Douglas County School District	862 F.2d 824 (11th Cir. 1989)	Invocations prior to public high school football games	Yes
Carter v. Broadlawns Medical Center	857 F.2d 448 (8th Cir. 1988)	County hospital hired chaplain	No
Wilder v. Bernstein	848 F.2d 1338 (2d Cir. 1988)	State law that allows city to contract with private (religious) agencies to place children (policy one of 1st come-1st served with preference to religion if available and does not deprive others)	No
Forest Hills Early Learning Center, Inc. v. Grace Baptist Church	846 F.2d 260 (4th Cir. 1988)	State statute exempting church run child care centers from licensing requirements	No

ACLU v. Allegheny County	842 F.2d 655 (3d Cir. 1988)	Placement of creche inside main entrance of city courthouse and display of menorah on steps of city building	Yes
Van Zandt v. Thompson	839 F.2d 1215 (7th Cir. 1988)	State house resolution authorizing and making plans for the conversion of hearing room in state capital into prayer room	No
Cuesnongle v. Ramos	835 F.2d 1486 (1st Cir. 1987)	Ruling by Puerto Rico Department of Consumer Affairs requiring university to reimburse students for cancelled classes	No
International Association of Machinists and Aerospace Workers v. Boeing	833 F.2d 165 (9th Cir. 1987)	Religious accommodation provision of Title VII	No
Crowder v. Southern Baptist Convention	828 F.2d 718 (11th Cir. 1987)	Court resolution of Parliamentary ruling made at church convention	Yes

United Christian Scientists v. Christian Science Board of Directors	829 F.2d 1152 (D.C. Cir. 1987)	Private copy-right law that grants Christian Science Board an extended copy-right on all edition of Science & Health	Yes
Smith v. Board of School Commissioners of Mobile County	827 F.2d 684 (11th Cir. 1987)	Use of home economics, history and social studies books that "advance secular humanism and inhibit theistic religion"	No—books are religiously neutral
American Jewish Congress v. City of Chicago	827 F.2d 120 (4th Cir. 1987)	Nativity scene in city hall	Yes
Page v. Commissioner	823 F.2d 1263 (8th Cir. 1987)	Exemption from income tax on secular employment because of relationship with church	No
Stein v. Plainwell Community Schools	822 F.2d 1406 (6th Cir. 1987)	Invocations and benedictions at public high school commencement	Yes—only because language invoked Christ name—would be okay if nondenominational

Hernandez v. Commissioner of Internal Revenue	819 F.2d 1212 (1st Cir. 1987)	Disallowment of tax deduction to member of Church of Scientology for payment made to church for religious services offered at fixed charge set by Church	No
Phan v. Commonwealth of Virginia	806 F.2d 516 (4th Cir. 1986)	State constitution provision allowing state to provide assistance to handicapped students attending any college in the state and any nonsectarian college out of state	No
Stark v. St. Cloud State University	802 F.2d 1046 (8th Cir. 1986)	University policy allowing students to fulfill student teaching requirement at parochial school	Yes

Parents' Association v. Quinones	803 F.2d 1235 (2d Cir. 1986)	Federally funded remedial education program with separate services for female Hasidic Jews provided at public school	Yes
Protos v. Volkswagen of America, Inc	797 F.2d 129 (3d Cir. 1986)	Religious accommodation requirement of Title VII	No
Northwest Indian Cemetery Protective Association v. Peterson	795 F.2d 688 (9th Cir. 1986)	District Court's enjoinder of road construction and timbering on Indian sacred land on grounds that such activity impermissibly burdened Indians free exercise right	No
ACLU v. City of Birmingham	791 F.2d 1561 (6th Cir. 1986)	Placement and maintenance of nativity scene by city on lawn of city hall	Yes
United Christian Scientists v. Christian Science Board of Directors	829 F.2d 1152 (D.C. Cir. 1987)	Private law granting church extended copyright on all editions of religious text	No

Christian Science Reading Room v. City of San Francisco	784 F.2d 1010 (9th Cir. 1986)	Airport policy allowing rental of space to religious organizations	No
Bethel Baptist Church v. United States	822 F.2d 1334 (3d Cir. 1987)	Statutory amendments compelling participation in social security system by churches and other non-profit religious organizations	No
EEOC v. Fremont Christian School	781 F.2d 1362 (9th Cir. 1986)	Application of statutes to religious school prohibiting discriminatory health insurance practice	No
Friedman v. Board of County Commissioners of Bernalillo	781 F.2d 777 (10th Cir. 1985)	Latin cross and spanish motto translating "with this we conquer" on the county seal	Yes
May v. Cooperman	780 F.2d 240 (3d Cir. 1985)	Observance of 1 minute of silence at beginning of school day	Yes
Universidad Cent. de Bayamon v. NLRB	793 F.2d 383 (1st Cir. 1985)	NLRB jurisdiction over religious university	No

Rayburn v. General Conference of Seventh-day Adventists	772 F.2d 1164 (4th Cir. 1985)	Application of Title VII to sexual discrimination of women ministers	Yes (under entanglement prong)
Aguillard v. Edwards	765 F.2d 1251 (5th Cir. 1985)	State statute requiring teaching of creation along with evolution	Yes
Bell v. Little Axe Independent School District	766 F.2d 1391 (10th Cir. 1985)	1. Public school permitting religious meetings to be held on premise during school hours with public school teacher participation 2. Equal access policy of school district	Yes Yes
Mellon Bank v. United States	762 F.2d 283 (3d Cir. 1985)	Disallowance of charitable deduction on income tax return for bequest to nonprofit non-denominational cemetery	No

Grove v. Mead School District	753 F.2d 1528 (9th Cir. 1985)	School Board refusal to remove book from sophomore English curriculum based on parents religious objection	No
Katcoff v. Marsh	755 F.2d 223 (2d Cir. 1985)	Army chaplain program	No Remand to determine if financing in urban areas is ok
Catholic High School Association v. Culvert	753 F.2d 1161 (2d Cir. 1985)	State Labor Relation Board regulation of bargaining over parochial school employees	No
Bender v. Williamsport Area School District	741 F.2d 538 (3d Cir. 1984)	Student initiated nondenominational prayer club during regular scheduled activity period	Yes

Nartowicz v. Clayton County School District	736 F.2d 646 (11th Cir. 1984)	1. School practice of permitting student religious group to meet on school premise under faculty supervision 2. School districts policy of permitting school public address system and bulletin boards to be used by churches for announcements	Yes Yes
Felton v. United State	739 F.2d 48 (2d Cir. 1984)	Use of Federal funds to finance programs which involve providing public school teachers and other professionals to religious schools (on the premises) to provide remedial instruction	Yes
First Assembly of God, Alexandria v. City of Alexandria	739 F.2d 942 (4th Cir. 1984)	Zoning restrictions that effect church school	No

McCreary v. Stone	739 F.2d 716 (2d Cir. 1984)	Display of creche in public park at no expense to village	No
Donovan v. Tony & Susan Alamo Foundation	722 F.2d 397 (8th Cir. 1983)	Applicability of Fair Labor Standards Act to nonprofit religious organization	No
Americans United for Separation of Church & State v. School District of Grand Rapids	718 F.2d 1389 (6th Cir. 1983)	Coop educational arrangement for shared time and community education use of religious school facilities by public school district	Yes
Elbe v. Yankton Independent School District	714 F.2d 848 (8th Cir. 1983)	Textbook loan statute	No on the facial claim (Remand for further consideration of application of statute)
St. Elizabeth Community Hospital v. NLRB	708 F.2d 1436 (9th Cir. 1983)	Jurisdiction of NLRB as to hospital employees	No
Jaffree v. Wallace	705 F.2d 1526 (11th Cir. 1983)	Prayer law—Nondenominational prayer in schools	Yes
ACLU v. Rabun County Chamber of Commerce	698 F.2d 1098 (11th Cir. 1983)	Cross on state park property	Yes (Rehearing)

Members of Jamestown School Committee v. Schmidt	699 F.2d 1 (1st Cir. 1983)	State statute providing bus transportation to nonpublic school children beyond school district boundaries	No
Donnelly v. Lynch	691 F.2d 1029 (1st Cir. 1982)	Nativity scene as part of city sponsored outdoor Christmas display	Yes
Hatcher v. Commissioner of Internal Revenue	688 F.2d 82 (10th Cir. 1979)	Mandatory participation in social security program	No
ACLU v. Rabun County Chamber of Commerce	678 F.2d 1379 (11th Cir. 1982)	Cross on state park property	Yes
EEOC v. Pacific Press Publishing Association	676 F.2d 1272 (9th Cir. 1982)	Application of Title VII of discrimination on basis of sex by church owned publishing house	No
Mueller v. Allen	676 F.2d 1195 (8th Cir. 1982)	Statute authorizing taxpayer to claim income tax deductions for their dependents' tuition, textbooks and transportation	No

Chambers v. Marsh	675 F.2d 228 (8th Cir. 1982)	Chaplain conducted prayer at state legislature	Yes
Lubbock Civil Liberties Union v. Lubbock Independent School District	669 F.2d 1038 (5th Cir. 1982)	School district policy permitting students to gather before or after regular school hours to voluntarily meet for religious purposes	Yes
Lanner v. Wimmer	622 F.2d 1349 (10th Cir. 1981)	City schools released time program permitting public school students to attend church operated seminars during regular school hours	1. Released No 2. Promotion Yes 3. Discretionary authority of school administration to grant credit for program Yes

		4. Granting credit in satisfied general compulsory school attendance	No
Karen B. v. Treen	653 F.2d 897 (5th Cir. 1981)	State statute and derivative school board regulations which establish guidelines for student participation in prayer at school	Yes
EEOC v. Southwestern Baptist Theological Seminary	651 F.2d 277 (5th Cir. 1981)	Application of Title VII report requirements to seminary's nonministerial positions	No
Collins v. Chandler Unified School District	644 F.2d 759 (9th Cir. 1981)	School district permitted voluntary prayer at school assemblies	Yes
Grendel's Den, Inc. v. Goodwin	662 F.2d 88 (1st Cir. 1981)	State statute governing issuance of liquor licenses within 500 ft of church or school	No
Grendel's Den Inc v. Goodwin	662 F.2d 102 (1st Cir. 1981) (en banc)	Same	Yes

Jaffee v. Alexis	659 F.2d 1018 (9th Cir. 1981)	Administrative policy prohibiting all speech and fund solicitation activities conducted by religious groups in Department of Motor Vehicles	Yes
Nottelson v. Smith Steel Workers	643 F.2d 445 (7th Cir. 1981)	Civil Rights Act prohibiting unreasonable refusal to accommodate religiously motivated conduct and practice of employee	No
Valente v. Larson	637 F.2d 562 (8th Cir. 1981)	State act exempting religious societies which receive more than 50% of contributions from members of affiliated organizations from certain registration and disclosure requirements	Yes (Discriminates against some organizations. Would be okay if applied evenhandedly)

Gilfillan v. City of Philadelphia	637 F.2d 924 (3d Cir. 1980)	City expenditures for erection of altar and cross in connection with Mass to be given by Pope John Paul II during his visit and the city's involvement in the planning and coordination of the Mass	Yes
Chess v. Widmar	635 F.2d 1310 (8th Cir. 1980)	University regulation which denied right to conduct religious services in university owned building while allowing access to other groups	Yes
Brandon v. Board of Education	635 F.2d 971 (2d Cir. 1980)	Student organization for communal prayer meetings in public school immediately before school day begins	Yes

EEOC v. Mississippi College	626 F.2d 477 (5th Cir. 1980)	Application of Title VII to college controlled, owned and operated by religious group	No
Hall v. Bradshaw	630 F.2d 1018 (4th Cir. 1980)	Motorist prayer on state maps published and distributed by state department of transportation	Yes
Decker v. O'Donnell	661 F.2d 598 (7th Cir. 1980)	Payment of public funds for public service employment positions in elementary and secondary schools operated by sectarian or religious organization	Yes
Rhode Island Federation of Teachers AFL-CIO v. Norberg	630 F.2d 855 (1st Cir. 1980)	State statute granting state income tax deduction for tuition, textbooks and transportation	Yes

Florey v. Sioux Falls School District	619 F.2d 1311 (8th Cir. 1980)	Rules drawn up by school board permitting observance of holidays that are <i>both</i> religious and secular	No
United States v. Freedom Church	613 F.2d 316 (1st Cir. 1979)	IRS summons seeking to require pastor of church to produce church records to determine church's tax exempt status	No
Bogen v. Doty	598 F.2d 1110 (8th Cir. 1979)	Practice of having prayer by a local unpaid clergyman before county board meeting	No
Malnak v. Yogi	592 F.2d 197 (3d Cir. 1979)	Teaching of Transcendental Meditation in public schools	Yes
Public Funds for Public Schools of New Jersey v. Bryne	590 F.2d 514 (3d Cir. 1979)	Personal tax deduction for parents of students attending non-public elementary schools	Yes

Catholic Bishop of Chicago v. NLRB	559 F.2d 1112 (7th Cir. 1977)	NLRB jurisdiction over lay teachers at parochial school	Yes
Grutka v. Barbour	549 F.2d 5 (7th Cir. 1977), <i>cert denied</i> 97 S. Ct. 1706	NLRB as applied to lay teachers at parochial school	No
Meltzer v. Board of Public Instruction	548 F.2d 559 (5th Cir. 1977)	Morning bible readings, distribution of bibles and statutes requiring teachers to inculcate the practice of every christian virtue	Yes
Smith v. Smith	523 F.2d 121 (4th Cir. 1975)	Release-time program where public school students were released during school hours for religious instruction off school premises	No

Cummins v. Parker Seal Co.	516 F.2d 544 (6th Cir. 1975)	Provisions of Civil Rights Act of 1965 making it un- lawful employ- ment practices for employer to discharge any employee because of his religion	No
Daniels v. Waters	515 F.2d 485 (6th Cir. 1975)	State statute requiring any textbook ex- pressing an opinion about the origin of man to be prohibited un- less the text- book states that it is only theory and gives equal time to crea- tion	Yes

Kings Garden Inc. v. FCC	498 F.2d 51 (D.C. Cir. 1974)	Communica- tion act which requires en- forcement of antibias regu- lation with re- spect to job positions hav- ing no sub- stantial connection with program content or po- sitions con- nected with programs hav- ing no reli- gious dimension	No
Allen v. Morton	495 F.2d 65 (D.C. Cir. 1973)	Creche used in Christmas Pageant of Peace on the Ellipse	Yes
Anderson v. Laird	466 F.2d 283 (D.C. Cir. 1972), <i>cert</i> <i>denied</i> 93 S. Ct. 690 (1972)	Compulsory chapel attend- ance at mili- tary academies	Yes

FEDERAL DISTRICT COURTS

Walker v. San Francisco Unified School District	761 F. Supp. 1463 (N.D. Cal. 1991)	1. Provision of Education Consolidation and Improvement Act of 1981 permitting the funding of remedial education services to educationally deprived sectarian school children	Yes
		2. School districts use of mobile classrooms parked off of parochial school premises	No
		3. Mobile classroom parked on parochial school premise	Yes
		4. School district's practice of taking cost of obtaining mobile classrooms "off the top" of its entire budget	No
Sherman v. Community Consol. School District	758 F. Supp. 1244 (N.D. Ill. 1991)	State statute providing for daily recitation of Pledge of Allegiance	No

Church of Scientology Flag Service Organization, Inc. v. City of Clearwater	756 F. Supp. 1498 (M.D. Fla. 1991)	Municipal ordinance requiring charitable organizations to file registration statement or make available to members private disclosure statements	No
EEOC v. Tree of Life Christian School	751 F. Supp. 700 (S.D. Ohio 1990)	Enforcement of EEOC Equal Pay Act	No (under entanglement prong)
Lamont v. Schultz	748 F. Supp. 1043 (S.D.N.Y. 1990)	Use of public funds for construction, maintenance and operation of religious schools abroad pursuant to American Schools and Hospitals Abroad Program	Question Certified
Murray v. City of Austin	744 F. Supp. 771 (W.D. Tex. 1990)	City seal with latin cross based on founders coat of arms	No

Joki v. Board of Education	745 F. Supp. 823 (N.D.N.Y. 1990)	Public school displaying painting with religious theme in high school auditorium	Yes
Minnesota Federation of Teachers v. Nelson	740 F. Supp. 694 (D. Minn. 1990)	State act allowing public high school students to receive high school credit by taking courses at post secondary institutes—some religious—	No
Cohen v. City of Des Plaines	742 F. Supp. 458 (N.D. Ill. 1990)	State requiring special permit to operate day care center in single family resident district but not for day care centers in church building in same district	No

Walker v. San Francisco Unified School District	741 F. Supp. 30 (N.D. Cal. 1990)	1. Use of public funds at religiously neutral school located on premises of charitable or religious affiliated organization 2. Chapter 2 of Education Consolidation and Improvement Act which provides financial assistance to state and local educational agencies	No No
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Bishop v. Aronov	732 F. Supp. 1562 (N.D. Ala. 1990)	University prohibited injection of religious beliefs or preferences during instructional time and conducting optional class to discuss Christian perspective on academic topics	No
Harris v. City of Zion	729 F. Supp. 1242 (N.D. Ill. 1990)	Religious symbols on 2 cities corp. seals	1st city—No 2nd city—Yes
Weisman v. Lee	728 F. Supp. 68 (D.R.I. 1990)	Invocations and benedictions in form of prayer at public school graduation ceremonies	Yes

Pulido v. Cavazos	728 F. Supp. 1242 (W.D. Mo. 1989)	Public Funding of private schools providing Chapter 1 remedial education service	
		1. Take cost involved in administration of bypass of local education authorities in providing federal funding for remedial education to private schools off-the-top of state Chapter 1 allocation	No
		2. Take capital expenditures incurred as result of Supreme Court <i>Felton</i> decision off-the-top	Yes
		3. Remedial education to private school students by mobile or portable classrooms parked on parochial school campus	Yes

		4. Remedial education to private school students by mobile or portable classroom off parochial property	No
St. Bartholomew's Church v. City of New York	728 F. Supp. 958 (S.D.N.Y. 1989)	Statute under which landmark commission denied churches application to tear down activities building designated a landmark complex and replace it with highrise for church business	No
ACLU v. County of Delaware	726 F. Supp. 184 (S.D. Ohio 1989)	Nativity scene on courthouse lawn	Yes
Doe v. Small	726 F. Supp. 713 (N.D. Ill. 1989)	Private organizations display in city park of a painting depicting life of Christ	Yes

Doe v. Human	725 F. Supp. 1503 (W.D. Ark. 1989)	Bible classes provided by public schools during regular school hours and in school building for voluntary attendance by elementary school children	Yes
EEOC v. Jefferson Smurfit Corp.	724 F. Supp. 881 (M.D. Fla. 1989)	Civil Rights statute proscribing employment discrimination on ground of religion	No
Riveria v. East Otero School District	721 F. Supp. 1189 (D. Colo. 1989)	Distribution of religious literature in school by students—non-denominational Christian principles	No
Mendelson v. City of St. Cloud	719 F. Supp. 1065 (M.D. Fla. 1989)	Latin cross on city water tower	Yes
Allen v. Consolidated City of Jacksonville	719 F. Supp. 1532 (M.D. Fla. 1989)	Municipal resolution urging day of non-denominational voluntary prayer as indication of community wide declaration to "war on drugs"	No

Forte v. Coler	725 F. Supp. 488 (M.D. Fla. 1989)	Statute exempting child care facilities that were integral part of church or parochial schools from complying with state licensing requirements	No
Lundberg v. West Morona Community School District	731 F. Supp. 931 (N.D. Iowa 1989)	Allow minister to say prayer at high school graduation	Yes
United States Department of Labor v. Shenandoah Baptist Church	707 F. Supp. 1450 (W.D.N.C. 1980)	Fair Labor Act applied to church operated schools	No
Hewitt v. Joyner	705 F. Supp. 1443 (C.D. Cal. 1989)	County ownership and maintenance of park donated by sculptor with numerous sculptures reflecting religious themes	No
Roberts v. Madigan	702 F. Supp. 1505 (D. Colo. 1989)	1. Bible in school library 2. Religious oriented books in classroom	No Yes

		3. Teacher keeping personal bible out of sight during class hours	Yes
ACLU v. Wilkinson	701 F. Supp. 1296 (E.D. Ky. 1988)	1. State construction and use of structure resembling a biblical age stable on public grounds of state capital 2. State limitation to use display for nativity pageants	No—as long as disclaimer posted Yes
Kaplan v. City of Burlington	700 F. Supp. 1315 (D. Vt. 1988)	Menorah in city hall during Hanukkah	No
Smith v. Lindstrom	699 F. Supp. 549 (W.D. Va. 1988)	Erection of nativity scene on front lawn of county office building	Yes
Matther v. Village of Mundelein	699 F. Supp. 1300 (N.D. Ill. 1988)	Creche in holiday display on village hall front lawn	Yes
Wallace v. Washoe County School District	701 F. Supp. 187 (D. Nev. 1988)	Use of school facilities for regular and permanent weekly religious services	No

Jewish War Veterans v. United States	695 F. Supp. 3 (D.D.C. 1988)	Large cross on Marine Corp base	Yes
Clayton v. Place	690 F. Supp. 106 (W.D. Mo. 1988)	Prohibition of dancing on school property	Yes
Society of Separationist, Inc. v. Clements	677 F. Supp. 509 (W.D. Tex 1988)	Christmas carol program sponsored by Texas Public Employees Assoc.	No
Thompson v. Waynesboro Area School District	673 F. Supp. 1379 (M.D. Pa. 1987)	Student distribution of religious newspaper	No
Cammack v. Waihee	673 F. Supp. 1524 (D. Hawaii 1987)	Good Friday state legal holiday	No
Gregoire v. Centennial School District	674 F. Supp. 172 (E.D. Pa. 1987)	Rental of high school auditorium for magician's performance with evangelical religious message	No

Sherr v. Northport East-Northport Union Free School District	672 F. Supp. 81 (E.D.N.Y. 1987)	Limit of religious exemptions for mandatory inoculation of children as a condition for attending school to bona fide members of recognized religious organizations	Yes
Clark v. Dallas Independent School District	671 F. Supp. 1119 (N.D. Tex. 1987)	School district policy prohibiting student groups from meeting on campus immediately before or after school for religious purposes	No
ACLU v. City of Long Branch	670 F. Supp. 1293 (D.N.J. 1987)	Creation of Eruv on city property	No
ACLU v. Mississippi State General Service Administration	652 F. Supp. 380 (S.D. Miss. 1987)	Latin cross on side of state building	Yes

Warnke v. United States	641 F. Supp. 1083 (E.D. Ky. 1986)	Regulation mandating that employ- ing church designate por- tion of minis- ters income appropriate for parson's allowance ex- clusion	No
People Tags v. Jackson County Legislature	636 F. Supp. 1345 (W.D. Mo. 1986)	Zoning ordi- nance prohib- iting adult bookstore and theater within 1500 feet of school or church	No
Bethel Baptist Church v. United States	629 F. Supp. 1073 (M.D. Pa. 1986)	Social Ser- vices amend- ment which imposes man- datory partici- pation in social security system upon nonprofit in- stitutions	No
Libin v. Town of Greenwich	625 F. Supp. 393 (D. Conn. 1985)	Cross on fire- house	Yes
ACLU v. City of St. Charles	622 F. Supp. 1542 (D.C. Ill. 1985)	Illuminated Latin Cross in city's annual Christmas dis- play	Yes

United Christian Scientists v. Christian Science Board of Directors of the First Church of Christ, Scientist	616 F. Supp. 476 (D.D.C. 1985)	Private copy right law granting copy- right of all editions of Science and Health to Trustees un- der Mary Baker Eddy's will	Yes
Burelle v. City of Nashau	599 F. Supp. 792 (D.N.H. 1984)	Erection and maintenance of privately owned creche on grounds of building which housed munic- ipal govern- ment office	Yes
Greater Houston Chapter of ACLU v. Eckels	589 F. Supp. 222 (S.D. Texas 1984)	Three latin style crosses and the Star of David as part of war memorial in public park	Yes
Zwerling v. Reagan	576 F. Supp. 1373 (C.D. Ca. 1983)	Presidential proclamation of 1983 as the Year of the Bible	No

Berkshire Cablevision of Rhode Island v. Burke	571 F. Supp. 976 (D.R.I. 1983)	Requirement by Rhode Is- land division of Public Util- ities and Car- riers for cable television op- erator to pro- vide service on their insti- tutional net- works to non profit insti- tutes including religious ones	No
d'Errico v. Lesmeister	570 F. Supp. 1345 (D.N.D. 1983)	Portion of state tuition assistance pro- gram which provides for state financial aid to stu- dents attend- ing private religious col- leges	Yes
Duffy v. Las Cruces Public Schools	557 F. Supp. 1013 (D.N.M. 1983)	Statute au- thorizing local school boards to implement a daily mo- ment of si- lence	Yes
Donovan v. Tony & Susan Alamo Foundation	567 F. Supp. 556 (W.D. Ark. 1982)	Application of Fair Labor Standards Act to nonprofit religious orga- nization	No

Americans United for Separation of Church and State v. School District of Grand Rapids	546 F. Supp. 1071 (W.D. Mich. 1982)	Cooperative education ar- rangement for "shared time" and commu- nity educa- tional use of religious school facili- ties by public school district	Yes
Jaffree v. Board of School Commissioners of Mobile County	554 F. Supp. 1104 (D. Ala. 1982)	School Prayer Law	No
Donnelly v. Lynch	525 F. Supp. 1150 (D.R.I. 1981)	Nativity scene in Christmas display	Yes
Jamestown School Committee v. Schmidt	525 F. Supp. 1045 (D.R.I. 1981)	State statute providing bus transportation within school district to nonpublic school children	Yes
Mueller v. Allen	514 F. Supp. 998 (D. Minn. 1981)	State statute authorizing taxpayers to claim tax de- duction for dependents' tuition, text- books and transportation	No
ACLU v. Rabun County Chamber of Commerce	510 F. Supp. 886 (N.D. Ga. 1981)	Illuminated latin cross on state park property	Yes

McDaniel v. Essex International, Inc.	509 F. Supp. 1055 (W.D. Mich. 1981)	Title VII requirement for an attempt to accommodate the religious beliefs of employee	No
Citizens Concerned for Separation of Church and State v. City of Denver	508 F. Supp. 823 (D. Colo. 1981)	Displaying, storing and appropriating public funds for nativity scene as part of city's annual Christmas lighting program	No
Wilder v. Bernstein	499 F. Supp. 980 (S.D.N.Y. 1980)	State statutory scheme for provision of child care services which include religious matching	No
National Coalition for Public Education and Religious Liberty v. Harris	498 F. Supp. 1248 (S.D.N.Y. 1980)	Use of state funds for remedial education of parochial school students by public school teachers on the premises of parochial schools during regular school hours	No

Cromwell Property Owners Association v. Toffolon	495 F. Supp. 915 (D. Conn. 1979)	State statute authorizing transportation for children in district to nonpublic schools in adjacent districts and providing state reimbursement of cost of transportation	No
Grendel's Den Inc. v. Goodwin	495 F. Supp. 761 (D. Mass. 1980)	Statute governing issuance of liquor licenses within 500 feet of churches or schools	Yes
Voswinkel v. City of Charlotte	495 F. Supp. 588 (W.D.N.C. 1980)	Police chaplaincy program	Yes
Brandon v. Board of Education	487 F. Supp. 1219 (N.D.N.Y. 1980)	Community prayer meeting in public school prior to beginning of each school day	Yes
Decker v. United States Department of Labor	485 F. Supp. 837 (E.D. Wisc. 1980)	Funds under Comprehensive Employment Act to sectarian and religious schools	Yes

Americans United for Separation of Church and State v. Porter	485 F. Supp. 432 (W.D. Mich. 1980)	Dual enroll- ment program in which pub- lic school dis- trict leased portion of parochial schools for class use	Yes
Ring v. Grand Fork Public School District No. 1:	483 F. Supp. 272 (D.N.D. 1980)	Statute requir- ing Ten Com- mandments displayed in classroom	Yes
Citizens Concerned for Separation of Church and State v. City of Denver	481 F. Supp. 522 (D. Colo. 1979)	Nativity Dis- play erected and main- tained by gov- ernment on public prop- erty in Christ- mas lighting display	Yes
EEOC v. Pacific Press Public Association	482 F. Supp. 1291 (N.D. Ca. 1979)	EEOC exer- cise of juris- diction over nonprofit cor- poration affili- ated with a church and religiously ori- ented	No
Rhode Island Federation of Teachers v. Norberg	479 F. Supp. 1364 (D.R.I. 1979)	State income tax deduction for parents/ guardians for dependents' tuition, text- books and transportation	Yes

Gilfillan v. City of Philadelphia	480 F. Supp. 1161 (E.D. Pa. 1979)	City expendi- ture of public funds to con- struct and prepare plat- form to serve as a base for an altar as well as a cross to be used in reli- gious services during papal visit	Yes
Womens Services, P.C. v. Thone	483 F. Supp. 1022 (D. Neb. 1979)	State abortion bill requiring women re- ceive certain information and wait 48 hours before undergoing abortion	No
Chess v. Widmar	480 F. Supp. 907 (W.D. Mo. 1979)	University regulation un- der which the students were denied right to conduct regular reli- gious services in university owned build- ings	No
Akron Center for Reproductive Health, Inc. v. City of Akron	479 F. Supp. 1172 (N.D. Ohio 1979)	City abortion ordinance stating human life begins at conception	No

Decker v. United States	473 F. Supp. 770 (E.D. Wis 1979)	Awards, grants and contracts made under Comprehensive Employment Training Act to religious institutions for employment of teachers and other school personnel	Yes
Florey v. Sioux Falls School District	464 F. Supp. 911 (D.S.D. 1979)	School board policy concerning Christmas assembly and allowance for some religious content presented in prudent and objective manner	No
Committee for Public Education and Religious Liberty v. Levitt	461 F. Supp. 1123 (S.D.N.Y. 1978)	State statute which reimburses private schools for performing state mandated pupil testing and record keeping	No
Crowley v. Smithsonian Institution	462 F. Supp. 725 (D.D.C. 1978)	Evolution Dis-	No play

Lanner v. Wimmer	463 F. Supp. 876 (D. Utah 1978)	1. City time release program permitting public school students to attend church operated seminars during school hours 2. Granting credit for biblical courses geared to enforcing religious beliefs	No Yes
McCormick v. Hirsch	460 F. Supp. 1337 (M.D. Pa. 1978)	Jurisdiction of NLRB over parochial school employers where lay teachers seek to unionize	Yes
Surinach v. Pesquera de Busquets	460 F. Supp. 121 (D.P.R. 1978)	Governmental investigation into cost of parochial schools	No
Bogen v. Doty	456 F. Supp. 983 (D. Minn. 1978)	Nonpublic funded prayer by clergy at county board meeting	No

Public Funds for Public Schools of New Jersey v. Bryne	444 F. Supp. 128 (D.N.J. 1978)	State statute offering tax deduction to parents with dependent children in nonpublic elementary or secondary school	Yes
Malnak v. Yogi	440 F. Supp. 1284 (D.N.J. 1977)	Teaching of Transcendental Meditation in public schools	Yes
Goldsboro Christian Schools, Inc. v. United States	436 F. Supp. 1314 (E.D.N.C. 1977)	Nonexemption of private school for FICA and FUTA—(for racial discriminatory admission policy)	No
Filler v. Port Washington Union Free School District	436 F. Supp. 1231 (E.D.N.Y.)	New York Education Law—requiring public school districts to provide the district's resident children who attend nonpublic schools with all health and welfare services available to district public school children	No

Lendall v. Cook	432 F. Supp. 971 (E.D. Ark 1977)	State scholarship program which applies to public and private schools	No
Americans United for Separation of Church and State v. Blanton	433 F. Supp. 97 (N.D. Tenn. 1977)	State student assistance program (includes funding for private and public colleges, vocation and technical schools)	No
Hernandez v. Hanson	430 F. Supp. 1154 (D. Neb 1977)	School district requirement that students obtain prior approval before distributing literature within public school on behalf of non-school organization	No
Smith v. Board of Governors of University of North Carolina	429 F. Supp. 871 (W.D.N.C. 1977)	State program of tuition grants and scholarships	No
Jamestown School Comm. v. Schmidt	427 F. Supp. 1338 (D.R.I. 1977)	State statute providing transportation out of school district boundary for sectarian school pupils	Yes

Committee for Public Education and Religious Liberty v. Levitt	414 F. Supp. 1174 (S.D.N.Y. 1976)	State statute providing reimbursement to private schools of expenses allocable to performance of certain state mandated pupil testing	Yes
Wolman v. Essex	417 F. Supp. 1113 (S.D. Ohio 1976)	State statute making certain materials or service available to elementary and secondary school children attending non-public schools	No
Kleid v. Board of Education of Fulton, Kentucky, Independent School District	406 F. Supp. 902 (W.D. Ky. 1976)	State statute requiring inoculation of school children against certain diseases	No
Thomas v. Schmidt	397 F. Supp. 203 (D.R.I. 1975)	Expenditures of state and local funds to lease space from Catholic sectarian institution for public school classroom use	No

Bob Jones University v. Johnson	396 F. Supp. 597 (D.S.C. 1974)	Federal assistance to fundamentalist religious university through Virginia Educational Benefits Statute	No (under entanglement prong)
Smith v. Smith	391 F. Supp. 443 (W.D. Va. 1975)	Release time program in public school	Yes
Wilder v. Sugarman	385 F. Supp. 1013 (S.D.N.Y. 1974)	State constitutional and statutory provision for child placement	No
Roemer v. Board of Public Works	387 F. Supp. 1282 (D. Md. 1974)	State statute providing public aid in form of noncategorical grants to eligible colleges and universities and prohibits use for sectarian purpose	No

Americans United for Separation of Church and State v. Dunn	384 F. Supp. (M.D. Tenn. 1974)	State tuition grant program which pro- vides tuition grants for students at- tending church related colleges and universities as well as other colleges and universities	Yes
Jones v. Butz	374 F. Supp. 1284 (S.D.N.Y. 1974)	Humane Slaughter Act relating to rit- ual slaughter	No
Meek v. Pittenger	374 F. Supp. 630 (E.D. Pa. 1974)	State expendi- tures in con- nection with education of students in nonpublic schools. 1. State pro- vided auxiliary service, loan- ing of text- books, instructional material and sports equip- ment 2. Loaning of movie projects other audio- visual equip- ment	No Yes

Americans United for Separation of Church and State v. Budd	379 F. Supp. 872 (D. Kan. 1974)	State statute providing tui- tion grants to qualified stu- dents enrolled in private state colleges and universi- ties	No, but imper- missible if school gave preference to own religion, or required reli- gious participa- tion not eligible
Americans United for Separation of Church and State v. Board of Education of Beechwood Independent School District	369 F. Supp. 1059 (E.D. Ky. 1974)	Dual enroll- ment contract, where school district leased space in paro- chial school	Yes
Americans United for Separation of Church and State	359 F. Supp. 505 (D.N.H. 1973)	Dual enroll- ment arrange- ment between school district and parochial school	Yes
Public Funds for Public Schools v. Marburger	358 F. Supp. 29 (D.N.J. 1973)	State aid to parents of nonpublic school stu- dents—reim- bursement for secular text- books, mate- rials and supplies	Yes

Kosydar v. Wolman	353 F. Supp. 744 (1972)	Tax credits to parents who incur educational expenses in excess of those generally born by parents for children in primary or secondary school	Yes
Committee for Public Education and Religious Liberty v. Nyquist	350 F. Supp. 655 (S.D.N.Y. 1972)	1. State statute providing for direct grants to nonpublic schools serving high concentration of low income families and providing for flat tuition to parents with income less than \$5,000 whose children attend elementary or secondary nonpublic schools 2. State income tax deduction	Yes No

Americans United for Separation of Church and State v. Paire	348 F. Supp. 506 (D.N.H. 1972)	Facilities lease and dual enrollment agreement between school district and parochial school	Yes
Otero v. New York City Housing Authority	344 F. Supp. 655 (S.D.N.Y. 1972)	Preference to Jews for housing project because it was located near old historic synagogue	Yes
Committee for Public Education and Religious Liberty v. Levitt	342 F. Supp. 439 (S.D.N.Y. 1972)	State statute that provided payment of public funds to nonpublic schools that imposed religious restrictions on admissions, required attendance of pupils at religious activities and where religious mission was integral part of teaching	Yes
Wolman v. Essex	342 F. Supp. 399 (S.D. Ohio 1972)	Educational grants to parents with children in nonpublic schools	Yes

Lemon v. Sloan	340 F. Supp. 300 (E.D. Pa. 1972)	Reimbursement of tuition paid to parent who send children to nonpublic schools	Yes
Americans United for Separation of Church and State v. Oakey	339 F. Supp. 545 (D. Vt. 1972)	State statute enabling town or school district to provide state approved teachers and grant aid to nonpublic schools for teachers and educational material	Yes
Lemon v. Kurtzman	348 F. Supp. 300 (E.D. Pa. 1972)	Payment of claim to church related schools under Nonpublic Elementary and Secondary Education Act held to be unconstitutional by the Supreme Court	No if cost incurred before June 28, 1971 Supreme Court decision
Allen v. Morton	333 F. Supp. 1088 (D.D.C. 1971)	Construction and maintenance of creche in Christmas Pageant of Peace on Ellipse	No

Brusca v. State of Missouri State Board of Education	332 F. Supp. 275 (D. Mo. 1971)	Provision of Missouri Constitution and implementing statutes which establish and provide for funding of free public school systems and prohibit use of public funds to aid religious or sectarian schools	No
Johnson v. Sanders	319 F. Supp. 421 (D. Conn. 1970)	State non-public Secular Education Act allowing state to purchase secular education services supplied to children	Yes
Tilton v. Finch	312 F. Supp. 1191 (D. Conn. 1970)	Federal grants to church related colleges and universities for construction of academic facilities	No
In re Green	73 B.R. 893 (Bankr. W.D. Mich. 1987)	Chapter 13 plan allowing debtor to tithe	No

STATE COURTS

Alabama

Alabama Education Association v. James	373 So. 2d 1076 (Ala. 1979)	State statute establishing student assistance program providing state grants for postsecondary education	No
Opinion of the Justice	291 Ala. 301, 280 So. 2d 547 (1973)	Bill providing tuition grants to resident students attending private colleges and universities in Alabama	Yes

Alaska

Bonjour v. Bonjour	598 P.2d 1233 (Alaska 1979)	State statute specifying that religious needs of minor child could be considered in awarding custody	No
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Arkansas

Cortez v. Independence County	287 Ark. 279, 698 S.W.2d 291 (1985)	County issuance of educational facilities bond to finance construction and physical improvements at private church sponsored college	No
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California

Woodland Hills Homeowners Organization v. Los Angeles Community College District	266 Cal. Rptr. 767 (Ct. App. 1990)	Long term lease of community college district surplus land to religious organization	No
Sands v. Morongo Unified School District	53 Cal. 3d 863, 809 P.2d 809, 812 Cal. Rptr. 34 (1991), <i>rev'd</i> 214 Cal. App. 3d 45, 262 Cal. Rptr. 452 (Ct. App. 1989)	Nonsectarian invocation and benedictions at public high school graduation	Yes
Okrand v. City of Los Angeles	207 Cal. App. 3d 566, 254 Ca. Rptr. 913 (Ct. App. 1989)	Unlit menorah display near Christmas tree rotunda	No

Jimmy Swaggart Ministries v. Board of Equalization	224 Ca. App. 3d 1269, 250 Cal. Rptr. 891 (Ct. App. 1988)	Imposition of sales and use tax, paid under protest, on religious organization	No
Perumal v. Saddleback Valley Unified School District	198 Cal. App. 3d 64, 243 Cal. Rptr. 545 (Ct. App. 1988)	School board's denial of distribution of religious club flyers on high school campuses and publication of clubs advertisements in high school yearbook	No
Bennett v. Livermore Unified School District	193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (Ct. App. 1987)	Invocation at high school graduation	Yes
O'Connor Hospital v. Superior Court (Cleu)	240 Cal. Rptr 766 (Ct. App. 1987)	Granting hospital immunity for suit in priest's action	No
International Society for Krishna Consciousness, Inc. v. County of Los Angeles	169 Cal. Rptr 405 (1980)	Welfare exemption in Revenue and Tax Code	No

Feminist Women's Health Center, Inc. v. Philibosian	157 Cal. App. 3d 1076, 203 Cal. Rptr. 918 (1978)	DA's burial of aborted fetus in private cemetery after becoming aware of religious burial service	Yes
Fox v. City of Los Angeles	22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978)	Lit singled barred cross on city hall	Yes
Fox v. City of Los Angeles	70 Cal. App. 3d 885, 139 Cal. Rptr. 180 (Ct. App. 1977)	Illumination of city hall window with a cross on Christmas eve and Christmas	No
Johnson v Huntington Beach Union High School District	68 Cal. App. 3d 1, 137 Ca. Rptr. 43 (Ct. App. 1977)	Voluntary student bible club meeting on public school campus during school day	Yes
Mandel v. Hodges	54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (Ct. App. 1976)	Closure of state offices on Good Friday between 12 and 3	Yes

Citizens for Parental Rights v. San Mateo County Board of Education	51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (Ct. App. 1975)	Sexual Education Course	No
California Education Facilities Authority v. Priest	12 Cal. 3d 593, 526 P.2d 513, 116 Cal. Rptr 361 (1974)	Education Facilities Authority Act which authorizes the issuance of revenue bonds and use of proceeds to rehabilitate or construct education facilities at private colleges and universities	No

Colorado

Conrad v. City of Denver	724 P.2d 1309 (Colo. 1986)	Nativity display on steps of city and county building	No
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Young Life v. Division of Employment and Training	650 P.2d 515 (Colo. 1982)	Excluding youth organization whose purpose is to spread the Christian message to young people from church exemption of unemployment tax	No
Americans United for Separation of Church Fund, Inc. v. Colorado	648 P.2d 1072 (Colo. 1982)	Colorado Student Incentive Grant Program	No

Connecticut

Caldor v. Thorton	191 Conn. 336, 464 A.2d 785 (1983)	State statute prohibiting dismissal for refusal to work on employees designated sabbath	Yes
Griswold Inn, Inc. v. State	183 Conn. 552, 441 A.2d 16 (1981)	State Statute prohibiting the sale of alcoholic beverages on Good Friday	Yes

Delaware

Keegan v. University of Delaware	349 A.2d 14 (Del. 1975)	Religious worship services in common rooms of dormitories at state university	No
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District of Columbia

Konecny v. District of Columbia	447 A.2d 31 (D.C. 1982)	Denying of employment compensation benefits to terminated church em- ployee	No
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Georgia

McDonnell v. Episcopal Diocese of Georgia	191 Ga. App. 174, 3871 S.E.2d 126 (Ct. App. 1989)	Jurisdiction of civil judicial system over ecclesiastical issues	Yes
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Idaho

Gregersen v. Blume	113 Idaho 220, 743 P.2d 88 (1987)	State licensing of barber shop when proprietor had sincere reli- gious beliefs for not licen- sing	No
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Illinois

Pre-School Owners Ass'n of Illinois v. Department of Children and Family Service	119 Ill. 2d 268, 518 N.E. 2d 1018 (1988)	Child Care Act exempting sectarian day care programs	No
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In re Tiskos	161 Ill. App. 3d 302, 514 N.E.2d 523 (Ill. App. 1987)	Court order requiring father to ar- range for daughters at- tendance at church ser- vices of faith in which she was being raised by mother during periods of vis- itation	No
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Zucco v. Garrett	150 Ill. App. 3d 146, 501 N.E.2d 875 (Ill. App. 1986)	Courts consid- eration of reli- gious beliefs as a factor in its decision to modify joint custody provi- sion	Yes
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Heckmann v. Cemeteries Association of Greater Chicago	127 Ill. App. 3d 451, 468 N.E.2d 1354 (Ill. App. 1984)	Statute per- mitting cer- tain burials on Sundays and legal holidays	No
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People ex rel Klingen v. Howlett	56 Ill.2d 3, 305 N.E.2d 129 (1973)	State statute granting par- ent of a child attending non- public school a yearly state grant for par- tial payment for expenses and state grant for textbooks and auxiliary ser- vices	Yes
Cecrle v. Illinois Educational Facilities Authority	52 Ill.2d 312, 288 N.E.2d 399 (1972)	Act providing for financing of institutions of higher edu- cation and ex- cluding facilities that which may be used for sec- tarian instruc- tion and study	No

Indiana

Terpstra v. State	529 N.E.2d 839 (Ind. Ct. App. 1988)	State require- ments to en- force registration of auto's and driver's licen- ses which con- flict with religious belief forbidding en- tering a con- tract with state or use of numbers for purpose of identification	No
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Kentucky

Farris v. Minit Mart	684 S.W.2d 845 (Ky. 1985)	State statute stating that no license for the retail sale of alcoholic beverages shall be issued for any premises located within 200 feet of church or school	Yes
Stone v. Graham	599 S.W.2d 157 (Ky. 1980)	Statute placing duty upon superintendent of Public Instruction to post copy of Ten Commandment in every public school prayer classroom on receipt of voluntary contributions made for such purpose to State Treasury	No

Maryland

Baltimore Lutheran High School Association v. Employment Security Administration	302 Md. 649, 490 A.2d 701 (1985)	Denial of exemption of religious school for unemployment taxes	No
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Massachusetts

Alberts v. Devine	479 N.E.2d 113 (Mass. 1985)	Judicial inquiry into church proceeding culminating in minister's failure to gain reappointment	No
Attorney General v. Bailey	386 Mass. 367, 436 N.E.2d 139 (1982)	Action requiring reporting of name, age and residence of every child attending church operated institution	No
Kent v. Commissioner of Education	380 Mass. 235, 402 N.E.2d 1340 (1980)	School prayer law (provided that teachers were to announce that period of prayer could be offered by student volunteer)	Yes

Colo v. Treasurer and Receiver General	378 Mass. 550, 392 N.E.2d 1195 (1979)	Expenditure of public mon- ies to pay sal- ary of legislative chaplains	No
Arno v. Alcoholic Beverages Control Commission	384 N.E.2d 1223 (Mass. 1979)	State statute prohibiting granting of liquor license to premises located within 500 feet ra- dius of school or church	No

Michigan

McLeod v. Providence Christian School	160 Mich. App. 333, 408 N.W.2d 146 (Ct. App. 1987)	Civil Rights Act—did not allow school to fire teacher with preschool age children when religious doctrine for- bad employ- ment of women with preschool age children	No
Sheridan Road Baptist Church v. Department of Education	426 Mich 462, 396 N.W.2d 373 (1986)	Requirement of teachers certification and certain curriculum taught	No

Snyder v. Charlotte Public School District	421 Mich. 517, 365 N.W.2d 151 (1984)	Non essential elective course offered to public school students and nonpublic school stu- dents equally	No
Sheridan Road Baptist Church v. Department of Education	348 N.W.2d 263 (Mich. App. 1984)	Curriculum and teacher certification requirement	No
Snyder v. Charlotte Public School District	333 N.W.2d 542 (Mich. App. 1983)	School district refusal to let private school students into public school band class	No
Citizens to Advance Public Education v. Porter	64 Mich. App. 168, 237 N.W.2d 232 (Ct. App. 1975)	Shared time secular educa- tion programs	No—as long as under authority and control of public school, op- erated by public school and open to all public school students

Minnesota

Minneapolis Community Development Agency	439 N.W.2d 708 (Minn. 1989)	Condemnation of property and authoriza- tion of quick tax	No
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Minnesota Higher Education Facilities Authority v. Hawk	232 N.W.2d 106 (Minn. 1975)	Issuance of tax exempt revenue bonds by the author- ity to refi- nance indebtedness of private reli- gious affiliated colleges in construction of secular ed- ucation facili- ties	No
Minnesota Civil Liberties Union v. State	302 Minn. 216, 224 N.W.2d 344 (1974)	Tax credit to parents or guardians of children in nonpublic schools	Yes

Missouri

Americans United for Separation of Church and State v. Rogers	538 S.W.2d 711 (Mo. 1976)	Missouri Fi- nancial Assist- ance Program	No
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Montana

Matter of S.P.	241 Mont. 190, 786 P.2d 642 (1990)	Placement and payment to ministers for foster care	No
Miller v. Catholic Diocese of Great Falls	224 Mont. 113, 728 P.2d 794 (1986)	Determination of tort case of bad faith by civil court	Yes

Nebraska

Cunningham v. Lutjeharm	231 Neb. 756 437 N.W.2d 806 (1989)	State statute requiring pub- lic school dis- tricts to purchase and loan textbooks to students in private schools	No
State ex rel Bouc v. School District of City of Lincoln	211 Neb. 731 320 N.W.2d 472 (1982)	State statute providing for transportation for children in private schools	No
State ex rel Rogers v. Swanson	912 Neb. 125, 219 N.W.2d 726 (1974)	Statute pro- viding for public grants to students in need of tui- tion aid to at- tend private colleges	Yes
State ex rel School District of Hartington v. Nebraska State Board of Education	188 Neb. 1, 195 N.W.2d 161 (1972)	Grant of fed- eral funds to provide special instructional activities (pub- lic school leas- ing of parochial classrooms)	No

New Hampshire

Opinion of the Justices	113 N.H. 297, 307 A.2d 558 (1973)	1. State statute authorizing and encouraging recitation of the Lord's Prayer in public schools	Yes
		2. Amendment which would authorize voluntary silent meditation and Pledge of Allegiance	No

New Jersey

Ran-Dav's County Kosher, Inc. v. State of New Jersey	243 N.J. Super. 232, 579 A.2d 316 (Super Ct. App. Div. 1990)	State kosher regulations	No
Market Street Mission v. Bureau of Rooming and Boarding House Standards, Department of Community Affairs, State of New Jersey	110 N.J. 335, 541 A.2d 668 (1988)	Rooming and Boarding House Act as applied to religious rescue mission	No

In re Estate of Dickerson	193 N.J. Super. 353, 474 A.2d 30 (1983)	Privately funded scholarship trust for student who intended to study for Protestant ministry	No
New Jersey State Board of Higher Education v. Board of Directors of Shelton College	90 N.J. 470, 448 A.2d 988 (1982)	State closing down of religious college until obtained license	No
Marsa v. Wernik	86 N.J. 232, 430 A.2d 888 (1981)	Nondenominational invocation or silent mediation at start of regular meeting of borough council	No
Playcrafters Members v. Teaneck Board of Education	177 N.J. Super. 66, 424 A.2d 1192 (Super. Ct. App. Div. 1981)	School board policy prohibiting extracurricular activities on Friday evenings, Saturday days and Sunday mornings	No
State v. Celmer	80 N.J. 405, 404 A.2d 1 (N.J. 1979)	Statute giving camp meeting association powers of a municipality	Yes

Marsa v. Wernick	163 N.J. 589, 395 A.2d 530 (Super. Ct. Ch. Div. 1978)	Nondenominational invocation or a silent meditation of about 1 minute at the start of regular meeting of city council	No
Resnik v. East Brunswick Township Board of Education	77 N.J. 88, 389 A.2d 944 (1978)	Use of public school facilities by religious group during noninstructional hours	No
Schaad v. Ocean Grove Camp Meeting Association	72 N.J. 237, 370 A.2d 449 (1977)	1. Ordinance prohibiting sale of newspapers in Association on Sundays and prohibiting driving of vehicle on Association streets on Sundays 2. Granting of police power to Association	Yes No
State v. Celmer	143 N.J. Super. 371, 362 A.2d 1330 (Monmouth Co. Ct. 1976)	Giving power to camp meeting association same as that of a municipality	Yes

Resnick v. East Brunswick Township Board of Education	135 N.J. Super. 257, 343 A.2d 127 (1975)	Use of public school as Sunday School and Hebrew language instruction	Yes
Clayton v. Kervick	59 N.J. 583, 285 A.2d 11 (1971)	State Educational Facilities Authority Law	No

New Mexico

Pruey v. Dept. of Alcoholic Beverage Control	104 N.M. 10, 715 P.2d 458 (1986)	Local option allowing districts to permit or reject Sunday sales of liquor	No
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New York

Claim of Klein	164 A.D.2d 9, 563 N.Y.S.2d 132 (App. Div. 1990)	Unemployment insurance benefits denied to teacher who had been employed at religious high school	No
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Board of Education v. Wieder	132 A.D.2d 409, 522 N.Y.S.2d 878 (App. Div. 1987)	Board of Education to provide special educational and related services for community's handicapped Hasidic children in facilities and under conditions that constitute a religious setting	Yes
Smith v. Community Board	491 N.Y.S.2d 584, 182 Misc. 2d 944 (Sup. Ct. 1985)	Construction and maintenance of Eruv on public property by Jewish organization	No
Trietly v. Board of Education	65 A.D.2d 1, 409 N.Y.S.2d 912 (App. Div. 1978)	Bible clubs in public high schools	Yes
Cathedral Academy v. State	47 A.D.2d 390, 366 N.Y.S.2d 900 (1975)	Reimbursement of funds expended for certain school related services	Yes
Cathedral Academy v. State	77 Misc.2d 977, 354 N.Y.S.2d 900 (1974)	Reimbursement of funds expended for certain school related services	Yes

Greve v. Board of Education	43 A.D.2d 851, 351 N.Y.S.2d 715 (App. Div. 1974)	Board of education to supply special teachers for auditory handicapped parochial school child in same manner as board provides its own schools to students with like handicaps	No
Dickens v. Ernesto	30 N.Y.2d 61, 281 N.E.2d 153, 330 N.Y.S.2d 346 (1972)	Placement of child with adoptive parents of same religion	No
College of New Rochelle v. Nyquist	37 A.D.2d 461, 326 N.Y.S.2d 765 (1971)	State aid to private Catholic girls college	No

North Carolina

Heritage Village Church and Missionary Fellowship, Inc. v. State	299 N.C. 399, 263 S.E.2d 726 (1980)	Solicitation of Charitable Funds Act exemption from licensing requirements for all religious organizations except those whose financial support is derived primarily from contributions of nonmembers	Yes
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North Dakota

Best Products Co., Inc. v. Spaeth	461 N.W.2d 91 (1990)	Sunday Closing Law	No
State v. Anderson	427 N.W.2d 316 (N.D. 1988)	Compulsory school attendance law—which requires that teachers be certified	No
State v. Shaver	294 N.W.2d 883 (N.D. 1980)	Compulsory School Attendance Law	No

Ohio

Kinney State v. Mishimens	22 Ohio Misc.2d 43, 490 N.E.2d 931 (1984)	Statute proscribing endangerment of children by parents/custodians but providing exemption for those who treat physical or mental illness or defect by spiritual means accorded by religion	Yes
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In re Landis	5 Ohio App. 3d 22, 448 N.E.2d 845 (Ct. App. 1982)	Separation agreement (Final Decree) requiring husband to pay child's education at religious institution	No
Protestants and Other Americans for Separation of Church and State v. Essex	28 Ohio St. 2d 79, 275 N.E.2d 603 (1971)	Statute authorizing payments of service and materials to pupils attending nonpublic schools for guidance, testing and counseling program	No

Oklahoma

State ex rel. Roberts v. McDonald	787 P.2d 466 (Okla. App. 1989)	State licensing requirement for boy's ranch operated by religious organization	No
Tulsa Area Hospital Council Inc. v. Oral Roberts University	626 P.2d 316 (Okla. 1981)	Granting of certification of need to university for construction of hospital in which holistic medicine would be practiced	No

Oregon

Kay v. David Douglas School District	79 Or. App. 384, 718 P.2d 875 (Ct. App. 1986)	Religious invo- cation in high school com- mencement exercise	Yes
Eugene Sand and Gravel Inc. v. City of Eugene	276 Or. 1007, 558 P.2d 338 (1976)	City authoriza- tion to erect by private parties a large cross in municipal park on butte over- looking city	No

Pennsylvania

Springfield School District, Delaware County v. Department of Education	397 A.2d 1154 (Pa. 1979)	Statute which requires both nonpublic and public school pupils to be transported to their schools of attendance within district and within ten miles out- side district boundaries	No
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Commonwealth Department of Education v. First School	348 A.2d 458 (Pa. Cmwlt 1975)	Statute au- thorizing reim- bursement of nonpublic schools for ex- penditures for teachers' sa- laries, text- books and other instruc- tional material	Yes
Estate of Laning	339 A.2d 520 (Pa. 1975)	Enforcement of will with condition of inheritance as "member in good standing of Presbyter- ian church"	No

South Carolina

Durham v. McLeod	192 S.E.2d 202 (S.C. 1972)	Act authoriz- ing state agency to make, insure or guarantee loans to stu- dents to de- fray their expenses at any institute of higher learning	No
Hunt v. McNair	187 S.E.2d 645 (S.C. 1980)	Educational Facilities Au- thority Act	No

South Dakota

Matter of North Western Lutheran Academy	290 N.W.2d 845 (S.D. 1980)	Unemploy- ment compen- sation laws as applied to church schools	No
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Tennessee

Covant Community Church v. Lowe	698 S.W.2d 339 (Tenn. 1985)	Privilege tax on occupancy of hotel and motel rooms as applied to church which rented rooms solely for reli- gious worship and instruc- tion	No
Steele v. Waters	527 S.W.2d 72 (Tenn. 1975)	Statute pros- cribing biology textbooks give equal time to creation as evolution, state that ev- olution only a theory, and excludes oc- cult or satani- cal beliefs of human origin	Yes

Texas

Bullock v. Texas Monthly, Inc.	731 S.W.2d (Tex. Ct. App. 1987)	Statutory exemption from sales tax granted religious periodicals	No
State v. Corpus Christi People's Baptist Church, Inc.	683 S.W.2d 692 (Tex. 1984)	State licensing of church child care facilities	No

Utah

Manning v. Sevier County	517 P.2d 549 (Utah 1973)	1. Agreement between county, city and church whereby city/county would finance two-thirds cost of hospital, and involved lease/rent back program 2. Gift of hospital by county to church controlled corporation	No Yes
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Virginia

Miller v. Ayres	214 Va. 171, 198 S.E.2d 634 (1973)	Statute relat- ing to tuition assistance loans at pri- vate institu- tion	No
Miller v. Ayres	213 Va. 149, 191 S.E.2d 261 (1972)	Statute relat- ing to tuition assistance loans at pri- vate institu- tion	No

Washington

State v. Motherwell	114 Wash. 2d 353, 788 P.2d 1066 (1990)	Child abuser reporting stat- ute as applied to religious organization	No
In re Dependency of J.L.T.	56 Wash. App. 683, 785 P.2d 829 (Ct. App. 1990)	Statute per- mitting reli- gious affiliated child welfare agencies to file termina- tion petitions	No
Witters v. State Commission for the Blind	112 Wash. 2d 363, 771 P.2d 1119 (1989)	Denial of fi- nancial voca- tional assistance by Commission to student pursu- ing bible stud- ies degree	No

State v. Wendt	47 Wash. App. 42, 735 P.2d 1334 (Ct. App. 1987)	Assignment of No case to Labor Department because reli- gious beliefs do not permit him to bring law suit in own name	
Bill of Rights Legal Foundation v. Evergreen State College	44 Wash. App. 690, 723 P.2d 483 (Ct. App. 1986)	Co-sponsored lecture series by state col- lege and church	No
State ex rel. Boyles v. Whatcom County Super. Ct.	103 Wash. 2d 610, 694 P.2d 27 (1985)	Single work release pro- gram which mandated par- ticipation in religious activ- ities	Yes
Witter v. Commission for the Blind	1202 Wash. 2d 624, 689 P.2d 53 (1984)	Denial of fi- nancial voca- tional assistance by Commission for student pursuing a bi- ble studies de- gree	Yes

Grant v. Spellman	99 Wash. 2d 815 664 P.2d 1227 (1983)	County refusal to grant non-union public employee statutory exemption from union security clause on grounds that he is not member of church or religious body	Yes
Weiss v. Bruno	82 Wash. 2d 199, 509 P.2d 973 (1973)	Financial assistance in grades 1-12 for needy and disadvantaged students attending private and public schools and thus providing tuition support programs for students attending independent or private institutions of higher education	Yes

Wisconsin

Shannon and Riordan v. Board of Zoning Appeals of Milwaukee	153 Wis. 2d 713, 451 N.W.2d 479 (1989)	Zoning statute and ordinance that prohibited placement of community based residential facilities within 2500 feet of existing facilities	No
American Motors Corp. v. State	93 Wis. 2d 14, 286 N.W.2d 847 (Ct. App. 1979)	Fair Employment Act to require employer to make reasonable accommodation to religious practices of employees	No
State v. Linder	91 Wis. 2d 145, 280 N.W.2d 773 (1979)	Statute creating Wisconsin Health Facilities Authority as mechanism for financing improvements for private, nonprofit health care facilities through sale of tax exempt bonds	No

State ex rel Holt v. Thompson	66 Wis. 2d 659 225 N.W.2d 678 (1975)	Statute gov- erning time release for re- ligious instruc- tion of public school stu- dents	No
State ex rel. Warren v. Nusbaum	64 Wis. 2d 314, 219 N.W.2d 577 (1974)	State statute allowing school board to contract with sectarian institution for goods and services that provide special educational needs of handicapped children	
State ex rel Warren v. Nusbaum	55 Wis. 2d 316, 198 N.W.2d 650 (1972)	State statute authorizing state to con- tract with a church related university for the purchase of dental edu- cation for res- ident in states only dental school	Yes

APPENDIX B

CASES CITING ENDORSEMENT ANALYSIS

Supreme Court of United States

CASE	CITE	ISSUE	USE OF ENDORSEMENT ANALYSIS
County of Allegheny v. ACLU	492 U.S. 573, 109 S. Ct. 3086 (1989) (O'Connor, J., concurring)	Creche in county court- house and menorah out- side city and county build- ing	Use endorsement analysis to de- clare creche vio- lation but not menorah
Hernandez v. Commissioner of Internal Revenue	490 U.S. 680, 109 S. Ct. 2136 (1989) (O'Connor, J., dissenting)	Provision of Internal Reve- nue Code gov- erning charitable de- ductions	Apply Lemon Test and find no violation. En- dorsement termi- nology used in second prong and dissent
Texas Monthly, Inc. v. Bullock	489 U.S. 1, 109 S. Ct. 890 (1989)	Sales tax ex- emption for religious peri- odicals	Combines en- dorsement termi- nology with the Lemon Test to find exemption invalid
Corporation of Presiding Bishop v. Amos	483 U.S. 327, 107 S. Ct. 2862, 97 L.Ed.2d 273 (1987) (O'Connor, J., concurring)	Application of religious ex- emption to Ti- tle VII's prohibition against reli- gious discrimi- nation to secular non- profit activi- ties of religious orga- nization	No violation un- der Lemon Test. O'Connor concurs in judgment and argues for en- dorsement analy- sis

Edwards v. Aguillard	482 U.S. 578, 107 S. Ct. 2573, 96 L.Ed.2d 510 (1987)	Louisiana Balance Treaty for Creation-Science and Evolution-Science in Public School Instruction Act	Use Lemon Test to invalidate Act with some citing to O'Connor's endorsement analysis
Witter v. Washington Department of Services for the Blind	474 U.S. 481, 106 S. Ct. 748, 88 L.Ed.2d 846 (1986) (O'Connor, J., concurring)	Financial vocational assistance to blind student pursuing bible studies degree at Bible college	Use Lemon Test to find that aid is allowable. O'Connor mentions endorsement in her concurrence
Grand Rapids School District v. Ball	473 U.S. 373, 105 S. Ct. 3216, 87 L.Ed.2d 267 (1985) (O'Connor, J., concurring)	School districts shared time and community education programs	Use Lemon Test to find unconstitutional and use endorsement terminology in discussing the second prong
Wallace v. Jaffree	472 U.S. 38 (1984) (O'Connor, J., concurring)	State statute authorizing one minute period of silence in public schools for meditation or voluntary prayer	Endorsement terminology incorporated in second prong and discussed in O'Connor's concurrence
Lynch v. Donnelly	465 U.S. 668, 104 S. Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring)	Inclusion of nativity scene in Christmas display	Apply Lemon Test to find creche allowable. O'Connor suggests endorsement analysis in concurrence

Courts of Appeal

Harris v. City of New York	927 F.2d 1401 (7th Cir. 1991)	Elementary school directives for the removal of religious books from the class library, prohibiting teacher from reading or keeping the bible on his desk during school hours and removal of the bible from the school library	The first two directives where found to be permissible while the third directive was found to be in violation of the Establishment Clause. Court use the Lemon Test but incorporated endorsement terminology into the second prong
Doe v. Village of Crestwood	917 F.2d 1476 (7th Cir. 1990)	Municipal festival at which Roman Catholic Mass was held	Violation of Establishment clause under the endorsement analysis
United States v. Board of Education for School District of Philadelphia	911 F.2d 882, 898 (3d Cir. 1990) (Ackerman, J., concurring)	Refusal to allow teacher to wear religious grab	Court decide this under Free Exercise. Concurring opinion state that case should have been decided under the Establishment clause by endorsement analysis

Weisman v. Lee	908 F.2d 1090 (1st Cir. 1990)	Inclusion of invocations and benedictions in form of prayer in public school graduation ceremonies	Violation of Establishment clause. Use endorsement terminology as part of Lemon Test
Gregoire v. Centennial School District	907 F.2d 1366 (3d Cir. 1990)	Use of high school auditorium by religious organizations	No violation of Establishment clause. Use endorsement terminology as part of second prong in Lemon Test
Smith v. County of Albemarle	895 F.2d 953 (4th Cir. 1990)	Erection of nativity scene on front lawn of county office building	Violation of the Establishment clause. Endorsement terminology used as part of Lemon Test
Kaplan v. City of Burlington	891 F.2d 1024 (2d Cir. 1989)	Menorah in city hall during Hanukkah	Violation of Establishment clause using endorsement analysis
Clayton v. Place	889 F.2d 192, 195 (8th Cir. 1989) (Lay, J., dissenting)	School district policy prohibiting dancing	Though the majority finds no violation of the Establishment Clause, the dissent finds the school district policy in violation of the second prong of the Lemon Test which incorporates endorsement terminology

ACLU v. Allegheny County	842 F.2d 655 (3d Cir. 1988)	Placement of creche inside main entrance of city courthouse and display of menorah on steps of city building	Violation of Establishment. Endorsement terminology used in second prong of Lemon Test
Van Zandt v. Thompson	839 F.2d 1215 (7th Cir. 1988)	State house resolution authorizing and making plans for the conversion of hearing room in state capital into prayer room	No violation of the Establishment Test. Endorsement terminology used as in first prong of Lemon Test and to analyze whether prayer room is an accommodation of religion
Smith v. Board of School Commissioners of Mobile County	827 F.2d 684 (11th Cir. 1987)	Use of home economics, history and social studies books that "advance secular humanism and inhibit theistic religion"	No violation of Establishment clause. Endorsement terminology incorporated under second prong of Lemon Test

Hernandez v. Commissioner of Internal Revenue	819 F.2d 1212 (1st Cir. 1987)	Disallowment of tax deduction to member of church of scientology for payment made to church for religious services offered at fixed charge set by church	No violation of Establishment clause. Endorsement analysis language used along with the Lemon Test
Stark v. St. Cloud State University	802 F.2d 1046 (8th Cir. 1986)	University policy allowing students to fulfill student teaching requirement at parochial school	Violation of Establishment Clause. Endorsement terminology used along side Lemon Test
ACLU v. City of Birmingham	791 F.2d 1561 (6th Cir. 1986)	Placement and maintenance of nativity scene by city on lawn of city hall	Violation of Establishment clause. Endorsement terminology used in second prong of Lemon Test
Friedman v. Board of County Commissioners of Bernalillo	781 F.2d 777 (10th Cir. 1985)	Latin cross and spanish motto translating "with this we conquer" on the county seal	Violation of Establishment clause. Endorsement terminology used in second prong of Lemon Test

May v. Cooperman	780 F.2d 240, 252 (3d Cir. 1985) (Becker, J., dissenting)	Observance of one minute of silence at beginning of school day	Violation of Establishment clause using the Lemon Test. Dissent discusses endorsement analysis
Aguillard v. Edwards	765 F.2d 1251 (5th Cir. 1985)	State statute requiring teaching of creation along with evolution	Violation of Establishment clause. Endorsement terminology incorporated in Lemon Test
Grove v. Mead School District	753 F.2d 1528 (9th Cir. 1984) (Canby, J., concurring)	School Board refusal to remove book from sophomore English curriculum based on parents religious objection	No violation of Establishment Clause. Concurrence incorporates endorsement analysis in second prong of Lemon Test

District Courts

Chabad-Lubavitch of Vermont v. City of Burlington	754 F. Supp. 372 (D. Vt. 1990)	Menorah in city park closely identified with city hall	Violates Establishment clause under endorsement analysis
Murray v. City of Austin, Travis County, Texas	744 F. Supp. 823 (W.D. Tex. 1990)	City seal with latin cross based on founders coat of arms	No violation to Establishment Test. Endorsement terminology incorporated in second prong of Lemon Test

Joki v. Board of Education of Schuylerville, Cent. S.D.	745 F. Supp. 823 (N.D.N.Y. 1990)	Public school displaying painting with religious theme in high school auditorium	Violation of Establishment clause. Endorsement analysis incorporated in second prong of Lemon Test
Minnesota Federation of Teachers v. Nelson	740 F. Supp. 694 (D. Minn. 1990)	State act allowing public high school students to receive high school credit by taking courses at post secondary institutes—some religious	No violation of Establishment clause. Endorsement terminology incorporated in second prong of Lemon Test
Cohen v. City of Des Plaines	742 F. Supp. 458 (N.D. Ill. 1990)	State requiring special permit to operate day care center in single family residential district but not for day care centers in church building in same district	No violation of Establishment clause. Endorsement terminology incorporated into Lemon Test
ACLU v. County of Delaware	726 F. Supp. 184 (S.D. Ohio 1989)	Nativity scene on courthouse lawn	Violation of Establishment clause. Endorsement analysis used in second prong of Lemon Test

Doe v. Small	726 F. Supp. 713 (N.D. Ill. 1989)	Private organization's display in city park of a painting depicting the life of Christ	Violation of Establishment clause. Endorsement analysis incorporated in Lemon Test
EEOC v. Jefferson Smurfit Corporation	724 F. Supp. 881 (M.D. Fla.)	Civil Rights statute forbidding employment discrimination on the grounds of religion	No Violation of Establishment clause. Endorsement terminology use along with Lemon Test
ACLU V. Wilkinson	701 F. Supp. 1296 (E.D. Ky. 1988)	State construction and use of structure resembling a biblical age stable on the grounds of the state capital which was intended to be limited for use in nativity pageants	No violation if stage is made available to all groups and not limited for use in nativity pageants and if state posts a disclaimer as to the endorsement of religion
Kaplan v. City of Burlington	700 F. Supp. 1315 (D.Vt 1988)	Menorah in city hall during Hanukkah	No violation of Establishment clause. Endorsement analysis incorporated in second prong of the Lemon Test

Smith v. Lindstorm	699 F. Supp. 549 (W.D. Va. 1988)	Erection of nativity scene on front lawn of county of- fice building	Violation of Es- tablishment clause. Endorse- ment analysis discussed in con- text of second prong to the Lemon Test
Jewish War Veterans v. United States	695 F. Supp. 3 (D.D.C. 1988)	Large cross on Marine Corp base	Violation of Es- tablishment clause. Endorse- ment terminology used in second prong of Lemon Test
Ford v. Manuel	629 F. Supp. 771 (N.D. Ohio 9185)	School dis- tricts practice of renting ele- mentary school building to weekday religious edu- cational coun- cil immediately before and after school hours for con- duction of re- ligious classes	Violation of Es- tablishment clause. Endorse- ment terminology incorporated in Lemon Test

Fausto v. Diamond	589 F. Supp. 451 (D.R.I. 1984)	Continuous display, main- tenance and preservation of a memorial dedicated to the "Unknown Child" on mu- nicipal prop- erty	No violation of Establishment clause. Endorse- ment terminology incorporated in second prong of Lemon Test. Lemon Test re- duced to two prongs—effect and purpose
Amico v. New Castle County	101 F.R.D. 472 (1984)	Zoning ordi- nance prohib- iting siting of adult enter- tainment cen- ter within 2800 feet of church or school	No violation of Establishment clause. Endorse- ment terminology incorporated in second prong of Lemon Test

JUL 10 1991

IN THE
Supreme Court of the United States OF THE CLERK
October Term, 1990

ROBERT E. LEE, INDIVIDUALLY AND AS PRINCIPAL
OF NATHAN BISHOP MIDDLE SCHOOL, et al.,

Petitioners,

v.

DANIEL WEISMAN, ETC.,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the First Circuit

**BRIEF AMICI CURIAE OF THE
AMERICAN JEWISH CONGRESS, BAPTIST JOINT
COMMITTEE ON PUBLIC AFFAIRS, AMERICAN JEWISH
COMMITTEE, NATIONAL COUNCIL OF CHURCHES OF
CHRIST IN THE U.S.A., ANTI-DEFAMATION LEAGUE
OF B'NAI B'RITH, GENERAL CONFERENCE OF
SEVENTH-DAY ADVENTISTS, PEOPLE FOR THE
AMERICAN WAY, NATIONAL JEWISH COMMUNITY
RELATIONS ADVISORY COUNCIL, NEW YORK
COMMITTEE ON PUBLIC EDUCATION AND RELIGIOUS
LIBERTY AND JAMES E. ANDREWS AS STATED CLERK
OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN
CHURCH (U.S.A.) IN SUPPORT OF RESPONDENTS**

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Interest of Amici

The amici joining in this brief are Christian and Jewish religious organizations, one secular organization, and one coalition of religious and secular organizations, all with a special interest in religious liberty. These amici offer special expertise in the history of religious liberty and religious conflict, and in the impact of this Court's rules on religious belief and practice.

These amici are concerned principally with rejecting Petitioners' proposed coercion rule, and with preserving this Court's settled rule that government must be neutral toward religion. Amici believe that religion and religious liberty have benefitted from that rule, and that Petitioners' proposed coercion rule would be harmful to religion and to religious liberty. The bulk of this brief is devoted to the choice between the two rules, defending the neutrality rule in terms of constitutional text, history, precedent, and policy.

All but one of these amici agree that the specific practices at issue in this case are unconstitutional under

either a neutrality rule or a coercion rule; the remaining amicus is acting on the basis of a policy statement that speaks to the issue of principle but not to the particular facts. These amici do not agree on more difficult hypothetical cases. Some of these amici believe that any government-sponsored prayer is unconstitutional, in any format and with any audience. Some of these amici believe that government-sponsored prayers are permissible in certain limited circumstances, but that those circumstances are plainly not present here, and that it is not necessary to define them with precision in this case. All of these amici agree that Petitioners' coercion test is a fundamental threat to religious liberty.

Because many amici have joined in a single brief, the interests of individual amici are stated in appendices. This brief is filed with consent of the parties.

Summary of Argument

Petitioners and the United States say that their target is merely the *Lemon* test. But in fact, they would

have the Court abandon the fundamental requirement that government be neutral toward religion, and substitute instead the requirement that government refrain from "coercion." Their definition of coercion is extraordinarily narrow. Their proposal would require this Court to rewrite all its establishment clause cases, beginning with *Everson v. Board of Education*, 330 U.S. 1 (1947).

Petitioners' proposed coercion test is inconsistent with the original understanding of the Establishment Clause. The Establishment Clause must be read against the background of disestablishment in the states. Defenders of establishment everywhere tried to preserve establishment by making it less coercive, less preferential, and more inclusive. In the extreme cases of South Carolina and Virginia, establishment was reduced to a bare endorsement. These bare endorsements were rejected as establishments. Thus, the settled law of this Court -- that government endorsements of religion violate the Establishment Clause -- is firmly based in the original understanding.

The founding generation did not seriously consider the religious liberty implications of generically Protestant religious observances in public schools and government functions. Non-Protestant minorities were too few in numbers to force serious consideration of the issue. Religion in public education became controversial -- to the point of mob violence, church burnings, and deaths - - in the mid-nineteenth century, when the large Catholic immigration began.

The Catholic experience showed the necessity of applying to public schools the Founders' disestablishment principle, including the principle of no government endorsements of religion. The principle has not changed; it is still the original constitutional principle. Rather, changing social conditions have called attention to an important application of the principle, an application overlooked in the Founders' time because in their social conditions the question was merely academic.

Petitioners' coercion test would be harmful to religion and to religious liberty. Government-sponsored

religious observances politicize religion and lead inevitably to intolerance, desacralization, or both. These amici therefore believe that free exercise and disestablishment are equally important to religious liberty. In the words of the Presbyterian Church (U.S.A.), a member denomination of amicus National Council of Churches:

Together the two clauses guarantee that the people will have the fullest possible religious liberty. The state may not interfere with the private choice of religious faith *either by coercion or by persuasion*. It may not interfere with the expression of faith either by inducing people to abandon the religious faith and practice of their choice, or by inducing them to adopt the religious faith and practice of the government's choice.

God Alone Is Lord of the Conscience: A Policy Statement Adopted by the 200th General Assembly of the Presbyterian Church (U.S.A.) (1988) at 7, reprinted in 8 J.L. & Religion --, -- (1990) (forthcoming).

Justice Kennedy's proselytizing test is constitutionally insufficient for most of the same reasons that Petitioners' coercion test is insufficient.

The final section of this brief reviews the particular prayers and practices at issue in this case, and shows

that they violate the Court's longstanding neutrality rule and also any plausible version of a coercion rule.

Argument

I. Petitioners' Proposed Interpretation Would Eliminate the Establishment Clause As an Independent Protection for Religious Liberty.

This case was litigated below as a simple dispute about the application of settled precedents to stipulated facts. In this Court, new counsel have converted the case into a sweeping attack on religious liberty.

Petitioners and the United States would have this Court abandon the settled requirement that government be neutral toward religion. Petitioners argue that "government coercion of religious conformity is a necessary element of an establishment clause violation." Pet. Br. 14.

Petitioners do not shrink from the astonishing corollaries that flow from this proposition. Thus, they claim that "government may participate as a speaker in moral debates, including religious ones." *Id.* at 37, quoting

American Jewish Congress v. City of Chicago, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting). When Americans disagree about the nature of Christ, about salvation by works or by faith, about scriptural inerrancy, about the authority of the Book of Mormon, or any other religious matter, government at all levels can take sides in those debates. The President, the Congress, or the Providence School Committee, could adopt and promulgate creeds. The only constraint would be that government could not coerce persons to believe in these creeds.

Petitioners' argument does not depend on the brevity or content of the prayers in this case. Their claim that no one was coerced would be equally true or false if the Providence School Committee awarded diplomas at a Solemn High Mass, or at a full-length worship service of any other faith.

Petitioners present themselves in this case as the protectors of religion and of religious liberty. But these are false pretensions. Their coercion standard would

leave America's many religions exposed to the corrupting intrusions of government. Government could sponsor preferred churches, preferred theologies, preferred liturgies, preferred forms of worship, and preferred forms of prayer. All this is entailed when government undertakes to sponsor a "civil religion."

Government by its sheer size, visibility, authority, and pervasiveness could profoundly affect the future of religion in America. For government to affect religion in this way is for government to change religion, to distort religion, to interfere with religion. Government's preferred form of religion is theologically and liturgically thin. It is politically compliant, and supportive of incumbent administrations. One function of the Establishment Clause is to protect religion against such interference. To government's clumsy efforts to assist religion, these religious amici say "No thanks." Too much of such "assistance" and we are undone; the Constitution protects us from assistance such as this.

Petitioners' proposed rule is inconsistent with every accepted source of constitutional interpretation. It is inconsistent with constitutional text, because it leaves no independent meaning to the Establishment Clause. Even after *Employment Division v. Smith*, 110 S. Ct. 1595 (1990), the state would violate the Free Exercise Clause if it coerced persons to attend or participate in religious observances against their will. The proposed coercion test is also inconsistent with constitutional history, with precedent, and with sound policy toward religion. We consider each in turn.

II. The Original Meaning of Disestablishment Is That Government May Not Endorse or Advance Religion.

A. Endorsement of Religion Was the One Universal Element of Establishment in the Time of the Founders.

The classic religious establishments in the time of the Founders consisted of several elements in varying combinations. The only universal element of every establishment was government endorsement of one or more religions.

The point is most clearly illustrated by the experience of Virginia and South Carolina between 1776 and 1790. Before independence, the Church of England was the established church in these states. Each of these states initially responded to independence by attempting to eliminate coercion while preserving establishment. Each state created an establishment by endorsement: it designated an established religion while eliminating all tax support and all coercion to believe or to attend services. In each case, these reforms proved insufficient to satisfy the American demand for disestablishment, and the endorsements were subsequently repealed. These episodes show that endorsement of religion constituted establishment of religion in the political understanding of the Founders' generation. These events are summarized in several sources. Thomas E. Buckley, *Church and State in Revolutionary Virginia, 1776-1787* (1977); Thomas Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 134-51 (1986); Hamilton Eckenrode, *Separation of Church and*

State in Virginia (1910); Anson Phelps Stokes, *1 Church and State in the United States* 366-97, 432-34 (1950).

The path to disestablishment in Virginia began in 1776, when the legislature exempted dissenters from the tax to support the Anglican Church. A tax on Anglicans remained on the books, but the legislature suspended collection. It suspended this tax annually until 1779, when the tax was permanently repealed. Curry at 135-36. "[N]o taxes for religious purposes were ever paid in Virginia after January 1, 1777." Eckenrode at 53.

The legislature in 1776 also repealed English laws restricting freedom of worship. Some provisions for licensing clergy remained in effect but were not enforced. Buckley at 36. As the leading historian of disestablishment in Virginia summarizes the situation, "Religion in Virginia had become voluntary, and a man could believe what he wished and contribute as much or as little as he thought fit to whichever church or minister pleased him." *Id.*

But it was equally clear that the legislature "had not disestablished the Church of England." *Id.* at 37. The American branch of the Church of England, soon to be known as the Protestant Episcopal Church, was still the official church in Virginia. This designation had no coercive effect on dissenters; no one was required to attend or support the Episcopal Church. The establishment was simply an endorsement.

The Episcopal clergy retained one vestige of coercive power: only they could perform legally recognized marriage ceremonies. The other denominations condemned this monopoly, but no one then or now would contend that the coercive effect of this monopoly was the only vestige of establishment. The legislature repealed this monopoly in 1780, Eckenrode at 67-69, and residual licensing rules were eliminated in 1783 and 1784. *Id.* at 80, 100; Buckley at 111-12; 1 Stokes at 383-84.

The Episcopal Church found that its establishment carried the disadvantage of legislative supervision. The church sought to escape this supervision through an act

incorporating the church and empowering it to govern itself. Such an act was passed in 1784, repealing all prior laws regulating the relationship between the state and the established church. Buckley at 106; 1 Stokes at 384-87. This made the established church independent of the state, but it did not satisfy the opponents of establishment.

The opponents insisted that the law incorporating the Episcopal Church still gave it special recognition and a preferred status. A Presbyterian resolution condemned the act as giving the Episcopal Church "Peculiar distinctions and the Honour of an important name," and making it "the Church of the State." Buckley at 165. A Baptist committee denounced it as "inconsistent with american Freedom." Buckley at 140. Other petitions said the legislature had given Episcopalians "the particular sanction of and Direction of your Honourable House." Eckenrode at 121, 122. The state's endorsement was implicit rather than explicit; the opponent's

objection was not limited to open and formal declarations of establishment.

Finally, in 1787, the legislature repealed the Episcopal incorporation act, repealed all laws that prevented any religious society from regulating its own discipline, confirmed all churches in their existing property, and authorized all churches to appoint trustees to manage their property. Buckley at 170; 1 Stokes at 394. This act finally repealed the last vestige of state endorsement of the Episcopal Church in Virginia.¹

An even broader attempt at noncoercive establishment appeared in article 38 of the South Carolina Constitution of 1778. The entire provision is reprinted in 1 Stokes at 432-34; *see also* Curry at 149-51. The first sentence guaranteed religious toleration to monotheists, which would have included substantially the whole population. The second sentence provided that "The

¹ The one remaining issue was disposition of church property acquired before 1777. That was finally resolved in 1802, with the Episcopal Church retaining its churches but giving up its glebes, or land for the support of clergy. Buckley at 171-72.

Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State." Another sentence forbade any tax for the support of churches.

The one coercive element was that only established churches could obtain a corporate charter. Other churches apparently were organized as trusts or unincorporated associations; there was a synagogue in Charleston. Curry at 151. Churches desiring to incorporate were required to subscribe to five Protestant tenets set out in Article 38, and their ministers were required to swear an oath set out in Article 38. These provisions presumably had some tendency to coerce churches that desired the advantages of incorporation, but it would be myopic to say that incorporation rather than endorsement was the essence of this establishment. If non-established churches had been allowed to incorporate, and if free exercise had been extended beyond monotheists to include absolutely everybody, but the rest of Article 38 had been retained, Protestantism would still

have been the established religion of South Carolina. This establishment by endorsement was abolished by Article 8 of the Constitution of 1790, reprinted in 1 Stokes at 434; *see also* Curry at 151.

The general strategy of eighteenth century defenders of established religion was to propose modifications that made the establishment more inclusive, less preferential, and less coercive. The extreme instances of this strategy were the bare endorsements of South Carolina's Constitution and Virginia's Episcopal incorporation act. But other proposals pursued the same strategy with even less success.

The point is illustrated by unsuccessful proposals for general assessments to support the clergy in Virginia and Maryland. In each state, the supporters of establishment proposed a tax for the support of clergy, in which each taxpayer could designate the clergyman to receive his tax. The Virginia bill is reprinted in the Appendix to Justice Rutledge's dissent in *Everson*, 330 U.S. at 72-74. It allowed taxpayers to refuse to designate any cler-

gyman, in which case their tax would be paid to support local schools. *Id.* at 74.² Thus no one would be forced to support religion, and Baptists would not be required to violate conscience by supporting their own clergy through the instruments of government.

The element of choice in the taxpayers was said to make the establishment nonpreferential and noncoercive. Supporters of the Virginia bill invoked the slogan "Equal Right and Equal Liberty," and argued that "assessment imposed *not 'the smallest coercion'* to contribute to the support of religion." Curry at 145, quoting petitions to the legislature in 1784 and 1785 (emphasis added).

The Maryland bill went even further to eliminate coercion. Each taxpayer could pay his tax to the minister of his choice, or to a fund for the poor. Curry at 155. In addition, any taxpayer who declared "that he

² The bill's reference to "seminaries of learning" meant secular schools. See Buckley at 108-09, 133; Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 897 n.108 (1986).

does not believe in the Christian religion . . . shall not be liable to pay any tax for himself in virtue of this act."

Id. So no one was forced to support a church, and non-Christians were not forced to support anything. There was a state-created occasion for expressing one's religious dissent and exposing oneself to the social coercion of the community, but that same problem faces Respondent and his daughter in this case.

Both the Maryland and Virginia assessment bills were the subject of great public debate, and each was soundly defeated. The Virginia bill was the occasion for Madison's Memorial and Remonstrance Against Religious Assessments, and for many similar memorials by Presbyterians, Baptists, and other religious dissenters. See Buckley at 113-43; Eckenrode at 103-11.

No one suggested that the problem with these bills was that they had not gone quite far enough toward eliminating coercion. No one suggested a general exemption for all who declined to pay. No one suggested that the state should calculate a fair-share

contribution for each citizen and collect it only from those willing to pay. State assistance to churches was rejected as an establishment, even with the right to designate the recipient of the tax, to pay the tax to secular uses instead of religious ones, and in Maryland, to escape the tax altogether by declaring nonbelief.

What made these bills establishments was not coercion, but state support for religion. Dramatically reducing the coercive elements had not satisfied the opponents of establishment, and no one at the time appears to have thought that entirely eliminating the remnants of coercion would have made any difference. The essence of establishment, then as now, was state support for religion. Reducing or eliminating coercion did not affect the essence of what made these bills establishments.

These debates in the states are directly relevant to the original meaning of the federal Establishment Clause. In sweeping terms, the Constitution prohibits any law respecting an "establishment." "Establishment"

is not defined. Unavoidably, the word would have been understood in light of the recent debates over disestablishment in the states. These debates are the principal evidence of "how the words used in the Constitution would have been understood at the time." Robert Bork, *The Tempting of America* 144 (1990). As Justice Rutledge observed, "the Congressional debates on consideration of the Amendment reveal only sparse discussion, reflecting the fact that the essential issues had been settled." *Everson*, 330 U.S. at 42 (dissenting).

This Court's long-standing rule that government may not aid or endorse religion flows directly from the Founding generation's principle that government may not aid or support religion, even by bare endorsements in toothless laws.

B. The Original Meaning of Disestablishment Is Revealed by Debate Over Real Controversies; That Meaning Is Not Changed by Practices That Were Not Seriously Debated.

A second thread to Petitioners' argument is that government prayer must be constitutional because the

Founders did it. Pet. Br. 26-32. The premise of this argument is that anything the Founders did is OK. In fact Petitioners go further: the Constitution permits anything the Founders did and "any other practices with no greater potential for an establishment of religion." *Id.* at 30 n.31, quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., dissenting).

The Court has squarely rejected this argument, and properly so. *Allegheny*, 492 U.S. at 604-05. The argument proves far too much. Equally important, it ignores the political origin of constitutional rights.

Constitutional rights are designed to prevent the recurrence of historic abuses. Eliminating such abuses often requires major political battles. The People create constitutional rights when the winners of one of these political battles believe the issue to be so important, and the danger of regression so great, that the issue must be put beyond reach of the usual political processes.

Because constitutional rights emerge from major controversies, we should not expect to find a consensus

that unites both supporters and opponents of a constitutional provision, or even a fully consistent view of all related issues among the supporters. The winners muster a super-majority for a broad statement of principle, but they do not achieve unanimity or even consensus on either the principle or the details of its application. The attitudes that gave rise to the losing side of the controversy do not instantly disappear, and neither do the abusive practices that made the amendment necessary. Petitioners ignore reality when they propose to remove from the scope of constitutional rights any practices that survived ratification. See Douglas Laycock, *Text, Intent, and the Religion Clauses*, 4 Notre Dame J.L. Ethics & Pub. Pol'y 683, 688-91 (1990).

By Petitioners' principle, the Alien and Sedition Acts are an authoritative interpretation of the Free Speech and Press Clauses, de jure segregation of schools in the District of Columbia is an authoritative interpretation of the Equal Protection Clause, and the many devices that led to near total disenfranchisement of black voters for

most of a century are an authoritative interpretation of the Fifteenth Amendment. Moreover, these abuses would become the standard for further interpretation: government could engage in any other practice no more restrictive of constitutional rights than the Alien and Sedition Acts, school segregation, and disenfranchisement of black voters.

Petitioners' principle leads to such absurd consequences because it proceeds backwards. It lets the behavior of government officials control the meaning of the Constitution, when the whole point is for the Constitution to control the behavior of government officials.

The relevant original understanding is not determined by every specific act of the Founders. The nation's "heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause." *Allegheny*, 492 U.S. at 604-05. Rather, as Robert Bork has said, the original understanding of a constitutional clause consists not of a conclusion but of a major premise. The "major premise is

a principle or stated value that the ratifiers wanted to protect against hostile legislation or executive action."

Tempting of America at 162-63.

Another leading originalist has also explained that original intent depends on identifiable principles and not on every unexamined practice of the Founders:

The insistence on a principle, and not just historical fact, follows from the function of interpretation as enforcing the Constitution as law. If the Constitution is law, it must embody *principles* so that we can ensure that like cases are treated alike, and that those governed by the Constitution can understand what is required of them.

Michael McConnell, *On Reading the Constitution*, 73 *Corn. L. Rev.* 359, 363 (1988) (emphasis in original).

The basic principle of a constitutional clause is best identified from the controversies that gave rise to it. These controversies were consciously examined under political pressure that made the debate real and not just academic. These controversies identify the core target of the constitutional right. Interpreters can then search for a coherent principle, consistent with the constitutional text and as broad as the text, that centers on the

core problem the text was intended to resolve. See Laycock, 4 Notre Dame J.L. Ethics & Pub. Pol'y at 690.

The religion clauses had two great defining controversies. One was the long Protestant-Catholic conflict in the wake of the Reformation. The other was the battle over disestablishment in the states. These are the contexts in which the Founders thought about the meaning of establishment, and we should look to these controversies to learn what they meant by establishment.

C. Protestant-Catholic Conflict in the Nineteenth Century Revealed the Need to Apply the Neutrality Principle to the Public Schools.

Government prayer and religious proclamations, and the role of religion in public education, were not real controversies in the Founders' time. There were multiple reasons for this lack of controversy, but the most important was simply that the nation was overwhelmingly Protestant, and no significant group of Protestants was victimized by these practices. If a religious practice was not controversial among Protes-

tants, it was not sufficiently controversial to attract political attention.

Theological and liturgical differences among Protestants were large, but for a variety of reasons, these differences appear to have been bridgeable in the rudimentary schools of the time. Most schools were small, and many served a relatively homogenous local population. Some were run by local governments, some by associations of neighbors, some by entrepreneurial teachers, some by churches. Some of these schools defied characterization as public or private. In some urban areas, parents had many choices. The wide variety of schools is described by the historian Carl F. Kaestle in *Pillars of the Republic: Common Schools and American Society 1780-1860* at 13-61 (1983).

Professor Kaestle describes the movement for a more organized system of state-supported schools as growing out of a "Native Protestant ideology" that was comprehensive in its scope, including religious, political, and social reform principles. *Id.* at 75-103. This

ideology naturally incorporated religious instruction into the new common schools. The common school movement attempted to bridge the religious gaps among Americans with an unmistakably Protestant solution: by confining instruction to the most basic concepts of Christianity, and by reading the Bible "without note or comment." The Protestant leaders of the common school movement assumed that no one could object to reading the Bible, and by forbidding teachers to explain the passages read, they thought they had avoided sectarian disagreements about interpretation.

That solution was not entirely satisfactory even among Protestants. Conservative and evangelical Protestants accused Unitarians like Horace Mann of secularizing the public schools; stripped-down, least-common-denominator religion was not acceptable to them. Charles Glenn, *The Myth of the Common School* 131-32, 179-96 (1988); see also Kaestle at 98-99. One spokesman for the critics charged Horace Mann's Massachusetts schools of teaching "nothing more than Deism,

bald and blank." Matthew Hale Smith, quoted in Glenn at 189. But Protestants largely abandoned their disagreements to unite against the wave of Catholic immigration in the mid-nineteenth century. Glenn at 179; Kaestle at 98.

Catholics fundamentally challenged what seemed to them Protestant religious instruction in the public schools. Glenn at 196-204; Diane Ravitch, *The Great School Wars* 3-76 (1974). For one thing, Catholics used the Douay translation of the Bible, and objected to reading the King James translation, which they called "the Protestant Bible."

More important, Catholics condemned the "solution" of reading the Bible without note or comment as a fundamentally Protestant practice. Glenn at 199; Ravitch at 45. Protestants taught the primary authority of scripture and the accessibility of scripture to every human. Catholics taught that scripture must be understood in light of centuries of accumulated church teaching. For Catholic children to read the Bible

without note or comment was to risk misunderstanding. Protestant practices were being forced on Catholic children.

The controversy over the Protestant Bible in public schools produced mob violence and church burnings in Eastern cities. Kaestle at 170; Ravitch at 36, 66, 75; 1 Stokes at 830-31. The resulting controversies were major political issues for decades. The anti-Catholic, anti-immigrant Know Nothing Party swept elections in eight states in the 1850s. 1 Stokes at 836-37. Among other things, these issues gave rise to the proposed Blaine amendment to the Constitution, which would have codified the Protestant position by permitting Bible reading but forbidding "sectarian" instruction in any publicly-funded school. This amendment was defeated by Democrats in the Senate. 2 Stokes at 68-69. In Senator Blaine's subsequent campaign for the Presidency, these issues gave rise to one of the most famous gaffes in American politics, the jibe that Democrats were "the party of Rum, Romanism, and Rebellion." Arthur Schle-

singer, ed., *History of American Presidential Elections 1789-1968* at 1606 (1971).

Thus, in the wake of Catholic immigration, religion in the public schools produced exactly the sort of violent religious confrontation the Founders had sought to avoid. Religion in schools initially had been a nonproblem that raised no concern. Under changed social conditions, religion in schools became a serious violation of the disestablishment principle, which inflicted precisely "those consequences which the Framers deeply feared." *Abington School District v. Schempp*, 374 U.S. 203, 236 (1963) (Brennan, J., concurring). The principle of disestablishment did not change, but the nation was forced to confront a previously ignored application of the principle. Just as government could not endorse religion in statutes or state constitutions, neither could it endorse religion in public schools.

The first cases forbidding religious observances in public schools date from the latter part of this period. *State ex rel. Weiss v. District Board*, 76 Wis. 177, 44 N.W.

967 (1890) (mandamus against Bible reading); *Board of Education v. Minor*, 23 Ohio St. 211 (1872) (upholding and defending school board's decision to eliminate Bible reading and hymns). On the other hand, some schools whipped or expelled Catholic children who refused to participate in Protestant observances, and some courts upheld such actions. *Commonwealth v. Cooke*, 7 Am. L. Reg. 417 (Boston Police Ct. 1859); Kaestle at 171; 1 Stokes at 829. Neither side drew the line between coercion and noncoercion. Those who understood the grievance of religious minorities abandoned the offending practice; those who saw no grievance saw no reason not to coerce compliance.

The dispute over the Protestant Bible revealed the impossibility of conducting "neutral" religious observances even among diverse groups of Christians. Protestant education leaders did not set out to victimize Catholics; they genuinely thought that reading the Bible without note or comment was fair to all and harmful to none. What seemed harmless from their perspective was not

harmless when applied across the full range of American pluralism.

Today, the range of religious pluralism in America is vastly greater. Immigration has brought Jews, Muslims, Buddhists, Hindus, Sikhs, Taoists, animists, and many others. Significant numbers of atheists and agnostics have been with us since the late nineteenth century; they were little more than a theoretical possibility to the Founders. See James Turner, *Without God, Without Creed: The Origins of Unbelief in America* (1985). The possibility of "neutral" religious observance remains a fiction.

III. This Court Has Repeatedly and Continuously Rejected a Coercion Test from Its Earliest Consideration of the Issue.

Petitioners acknowledge that their new rule would require modification of the familiar test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). But their proposal is far more radical than that. Their attack reaches to the very core of the *Lemon* test -- to the proposition that govern-

ment conduct should not have the primary effect of either advancing or inhibiting religion.

This language did not originate in *Lemon*. The familiar three-part *Lemon* test is simply a convenient formulation of "the cumulative criteria developed by the Court over many years." 403 U.S. at 612. The third prong, excessive entanglement, came from *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970). The first two prongs -- the prongs that draw Petitioners' principal attack -- came verbatim from one of the school prayer cases, *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963).

The *Schempp-Lemon* formulation was simply an elaboration of the fundamental rule that government must be neutral with respect to religion. See *Schempp* at 222. The Court stated that rule in global terms in its first modern establishment clause decision: the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers." *Everson*, 330 U.S. at 18.

The United States says simply that "The problem is *Lemon*." U.S. Br. at 20. But the government's "problem" is not *Lemon*. The government's problem is the whole history of establishment clause jurisprudence in this Court. This Court rejected Petitioners' proposed coercion test at its first opportunity and at every opportunity since. A majority of a full Court firmly and explicitly rejected it just two years ago. *Allegheny*, 492 U.S. 573. Petitioners do not even acknowledge *Allegheny*'s existence. The single authority most cited in the argument portion of their brief is the *dissent* in *Allegheny*. Pet. Br. 9, 12, 30, 35, 36, 37, 38, 41, 43, 44. Their second most cited authority is the *dissent* in *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987). Pet. Br. 14, 19, 20, 25, 28, 37, 38, 43. And even the dissent in *Allegheny* does not support Petitioners' position. See *infra* 57-58.

This Court has never suggested that government may comply with the Establishment Clause merely by refraining from coercion. It is true that many opinions have

mentioned the evil of coercing persons to participate in religious observances. That is the most egregious case of establishment, and any form of government support for religion readily slides into coercion by imperceptible degrees. But contrary to Petitioners' claim, the Court's early opinions did not distinguish coercion from mere government persuasion, condemning one and approving the other. Rather, the early opinions treated coercion and government persuasion interchangeably, condemning either as unconstitutional.

Justice Black wrote for the majority in *Everson*:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, *aid all religions*, or prefer one religion over another. Neither can force *nor influence* a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion.

330 U.S. at 15 (emphasis added). This passage treats force and influence in matters of religion as equally objectionable. It treats aid to religion as the essence of establishment. And the Court certainly did not suppose

that government could "set up a church" if no one were coerced to support it.

Justice Rutledge for the four dissenters in *Everson* was even more explicit about noncoercive violations of the Establishment Clause. He listed coercive violations of the Establishment Clause, and he contrasted these with "the serious surviving threat[s]" of financial aid to religious institutions and "*efforts to inject religious training or exercises and sectarian issues into the public schools.*" 330 U.S. at 44 (Rutledge, J., dissenting) (emphasis added). Thus, none of the nine Justices in *Everson* believed that coercion was an element of every establishment clause violation.

The Court again equated coercion and persuasion in *Zorach v. Clausen*, 343 U.S. 306 (1952), upholding programs under which schools released students to attend private religious instruction. The Court said:

... if it were established that any one or more teachers were using their office *to persuade* or force students to take the religious instruction, a wholly different case would be presented.

Id. at 311. The Court distinguished the released time program in *Zorach* from the similar program in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), on grounds that had nothing to do with coercion. The charge of coercion in both cases rested on the claim that limiting students to study hall or religious instruction coerced them to choose religious instruction. 343 U.S. at 309-10. *Zorach* rejected that claim, finding neither coercion nor persuasion. Thus, *Zorach's* explanation of *McCollum*, essential to the holding in both cases, is that there was no coercion in *McCollum*, but there was an establishment clause violation in *McCollum* -- necessarily an establishment clause violation without coercion. This coercion-free violation was adjudicated in 1948.

The Court distinguished the cases on the ground that religious instruction was off campus in *Zorach*, but on campus in *McCollum*. 343 U.S. at 309. The key to an establishment clause violation was not coercion, but use of school property. Justice Brennan believed that the

use of school property mattered because it augmented the persuasive powers of the religious teachers:

To be sure, a religious teacher presumably commands substantial respect and merits attention in his own right. But *the Constitution does not permit that prestige and capacity for influence to be augmented* by the investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction.

Schempp, 374 U.S. at 263 (Brennan, J., concurring) (emphasis added).

In *McGowan v. Maryland*, 366 U.S. 420 (1961), the Court quoted *Everson's* explanation of establishment, permitting "neither force nor influence," *id.* at 443, and it quoted and italicized Justice Rutledge's identification of religious exercises in public schools as a noncoercive threat to disestablishment, *id.* at 444 n.18.

Thus it was no innovation when the Court squarely rejected a coercion test in the first school prayer case. *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962). Nor did the Court announce a distinction between direct and indirect coercion, as the United States suggests. U.S. Br.

at 19 n.18. The Court said that the Establishment Clause went far beyond even indirect coercion:

When the power, *prestige* and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. *But the purposes underlying the Establishment Clause go much further than that.* Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.

Engel, 370 U.S. at 431 (emphasis added).

The language elsewhere in the opinion confirms the depth of the Court's belief that coercion is no essential part of establishment clause analysis. It was unconstitutional for New York "to *encourage* recitation of the Regents' prayer," *id.* at 424, to place "its official stamp of *approval*" on any religion, *id.* at 429, or to use its "*prestige*" to "*support or influence* the kinds of prayer the American people can say," *id.* (all emphases added).

The Court reaffirmed its commitment to government neutrality toward religion in the second school prayer case, *Abington School District v. Schempp*, 374 U.S. 203, 215, 218, 222, 225-26 (1963). The Court said that the

purpose of the First Amendment was "to take *every form of propagation of religion* out of the realm of things which could directly or indirectly be made public business . . ." *Id.* at 216, quoting *Everson*, 330 U.S. at 26 (Jackson, J., dissenting) (emphasis added). And the Court said, the state cannot "perform or *aid in performing the religious function*." 374 U.S. at 219, quoting *Everson*, 330 U.S. at 52 (Rutledge, J., dissenting) (emphasis added).

The Court first quoted the entirety of *Engel's* holding that coercion is not an element of an establishment clause violation, 374 U.S. at 221, and then for emphasis paraphrased it more succinctly, *id.* at 223. And elaborating on "the wholesome 'neutrality' of which this Court's cases speak," the Court formulated what became the first two prongs of the *Lemon* test: "there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 222.

Justice Stewart in dissent suggested that coercion should be the key, *id.* at 316-20, so the issue was

squarely presented. He attracted no vote but his own. But his sensitive understanding of coercion makes clear that he would find coercion here. He recognized the dangers of "psychological compulsion to participate," *id.* at 318, and he thought it would be coercive if students who failed to attend religious exercises had to forgo "the morning announcements." *Id.* at 320 n.8. Graduation is a far more important event than morning announcements; if requiring students to miss the morning announcements is coercive, a fortiori requiring them to miss their graduation is coercive. All nine Justices in *Schempp* rejected Petitioners' position here.

The Court applied the *Schempp* test in *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968), and reaffirmed the government's duty to "be neutral in matters of religious theory, doctrine, and practice." *Id.* at 103-04.

Then began the long series of cases on financial aid to religious institutions. The two-part *Schempp* test was incorporated into the three-part *Lemon* test, and that test was quoted and applied in case after case.

More relevant here are the cases on government-sponsored religious observances. In cases arising in the public schools, this Court has struck down every such observance it has considered. In *Stone v. Graham*, 449 U.S. 39 (1980), Kentucky posted the Ten Commandments on the walls of schoolrooms. If ever it were plausible to say there is no coercion in a school case, *Stone* would have been the case. But the Court summarily invalidated the Kentucky practice, citing state "auspices" and "official support" for religion as unconstitutional. *Id.* at 42, quoting *Schempp*, 374 U.S. at 222.

Two years later, the Court unanimously invalidated a statute that authorized students and teachers to volunteer to lead the class in prayer. *Karen B. v. Treen*, 653 F.2d 897, 899 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982). The statute ineffectually provided that "no student or teacher could be compelled to pray," but that did not save the statute or even require full argument.

The following term the Court decided *Marsh v. Chambers*, 463 U.S. 783 (1983), upholding prayer in the

Nebraska legislature. Chief Justice Burger wrote a narrow opinion, relying on the "unique history" of legislative prayer, *id.* at 791, and the fact that the person claiming injury was an adult, *id.* at 792. The Court announced no new standard, and it did not question the general rule of government neutrality toward religion. In the same term, another opinion by Chief Justice Burger quoted and reaffirmed the *Schempp-Lemon* test, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982), and condemned a "symbolic benefit" to religion, *id.* at 125. Eight justices joined this opinion.

The following Term showed that *Marsh* did not apply to schools, and perhaps did not apply to anything other than the "unique" case of legislative prayer. The Court unanimously affirmed invalidation of a statute authorizing public school teachers to lead willing students in prayer. *Jaffree v. Wallace*, 705 F.2d 1526, 1535-36 (11th Cir. 1983), *aff'd mem.*, 466 U.S. 924 (1984). And all nine Justices applied the *Schempp-Lemon* test to the municipal Christmas display in *Lynch v. Donnelly*,

465 U.S. 668 (1984). The majority found the display sufficiently secular to justify a finding of secular purpose and effect, *id.* at 681-82; the dissenters disagreed.

It was in this case that Justice O'Connor offered her endorsement test to clarify the first two prongs of the *Lemon* test. *Id.* at 690. The Court incorporated Justice O'Connor's endorsement test into its analysis the following year in *Wallace v. Jaffree*, 472 U.S. 38 (1985). The Court quoted and applied the *Schempp-Lemon* test, but it also accepted the endorsement test as an authoritative elaboration:

"The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."

Id. at 56 n.42, quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). For similar statements by the Court, see *Wallace*, 472 U.S. at 58 n.45, 59, 61 & n.52. *Wallace* was also the occasion for Justice Powell's

emphatic defense of the *Lemon* test as the settled law of this Court. *Id.* at 63 & n.5 (Powell, J., concurring).

The endorsement test was so readily assimilated to the *Schempp-Lemon* test in this context because government-sponsored religious observances rarely present the ambiguities that the endorsement test was designed to clarify. Endorsement is a helpful way of explaining that it is not a forbidden benefit to religion to exempt conscientious objectors or otherwise remove burdens from religious practice. *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring). In the context of religious observances, which do not remove burdens and rarely have plausible secular purposes, it was immediately clear that the endorsement test and the *Schempp-Lemon* test were compatible.

Two years later, in *Edwards v. Aguillard*, 482 U.S. 578 (1987), the Court again applied the *Schempp-Lemon* test, *id.* at 582-83, as clarified by the endorsement test, *id.* at 585, to strike down a statute requiring balanced treatment of evolution and "creation science." The Court

noted that *Marsh v. Chambers* had been the only case in which the Court failed to apply the *Schempp-Lemon* test. *Id.* at 583 n.4.

Most recently, the Court applied the *Schempp-Lemon* test, as clarified by the endorsement test, to prohibit display of a creche in a county courthouse. *Allegheny*, 492 U.S. at 592. The Court did not say that the display was coercive; rather, it said that the display "has the effect of *endorsing* a patently Christian message." *Id.* at 601 (emphasis added).

Whether the key word is "endorsement," "favoritism," or "promotion," the essential principal remains the same. The Establishment Clause, at the very least, prohibits government from *appearing to take a position* on questions of religious belief . . .

Id. at 593-94 (emphasis added). The Court explained *Lynch v. Donnelly* as holding "that government may celebrate Christmas in some manner and form, but not in a way that *endorses* Christian doctrine." *Id.* at 601 (emphasis added).

Justice Kennedy's dissent proposed a fundamentally different standard: that "government may not coerce

anyone to support or participate in any religion or its exercise," *id.* at 659, and that government may not "proselytize on behalf of a particular religion," *id.* at 661.

The majority emphatically rejected this standard: "*Justice Kennedy's reading of Marsh would gut the core of the Establishment Clause, as this Court understands it.*" *Id.* at 604. And, the Court might have added, as this Court has long and all but unanimously understood it. The *Schempp* test was adopted eight to one, and the dissenter, Justice Stewart, understood coercion much more expansively than Petitioners here. The *Lemon* test was adopted seven to one -- eight to one with Justice Brennan's concurrence. The dissenter, Justice White, has never voted to uphold school-sponsored religious observances in a public elementary or secondary school.

The opinions just reviewed, committing the government to neutrality between religion and nonreligion, and forbidding government persuasion or influence in religious matters, have been joined by nearly every Justice appointed since the issues first reached this

Court: by Chief Justices Vinson, Warren, and Burger, by Justices Black, Reed (in *Everson* although not in *McCollum*), Frankfurter, Douglas, Murphy, Jackson, Rutledge, Burton, Clark, Minton, Harlan, Stewart (in *Lemon* although not in *Schempp*), Brennan, White (in *Wallace*, *Stone*, *Epperson*, and *Schempp*, although not in *Lemon*), Goldberg, Fortas, Marshall, Blackmun, Powell, Stevens, and O'Connor. "It is not right -- it is not constitutionally healthy -- that this Court should feel authorized to refashion anew our civil society's relationship with religion . . ." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 45 (1989) (Scalia, J., dissenting).

IV. Government Sponsorship Corrupts Religion and Promotes Least-Common-Denominator Faith and Liturgy.

Petitioners and the United States would have the Court assume that only nonbelievers are hurt by the practices at issue here. Even if that were true, it would be irrelevant; nonbelievers have constitutional rights too.

More relevant to these amici, it is not true. Government-sponsored religious observances hurt believers as well as nonbelievers. Such observances hurt all religions by imposing government's preferred form of religion on public occasions. It is not possible for government to sponsor a generic prayer; government inevitably sponsors a particular form of prayer. Whatever form government chooses, it imposes that form on all believers who would prefer a different form.

In some communities, government-sponsored prayer unabashedly follows the liturgy of the locally dominant faith in the community. See, e.g., *Jager v. Douglas County School District*, 862 F.2d 824, 826 (11th Cir. 1989) (frequent references to Christ); *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038, 1039 (5th Cir. 1982) (evangelical Protestant school assemblies). "Sensitive" communities such as Providence attempt to delete from public prayer all indicia of any particular faith, leaving only the least common denominator of majoritarian religion. But these stripped-down

prayers to an anonymous deity are as much a particular form of prayer as any other prayer.

The school teachers who plan the ceremony decide what prayers are acceptable and what not, and what clergy are acceptable and what not. In this process, the schools establish a religion of mushy ecumenism. The clergy for these prayers are determined by the limits of acceptability to the mainstream. In Providence and many other cities, the guidelines for this prayer are supplied by the National Conference of Christians and Jews. The NCCJ's guidelines implement its commitment to minimizing religious and ethnic conflict. The guidelines emphasize "inclusiveness and sensitivity," and they offer a specific list of "universal, inclusive terms for deity." J.A. 21. Government adoption of these guidelines establishes an uncoded but generally accepted book of common prayer.

This least-common-denominator strategy is the same strategy followed by the Protestant school reformers of the nineteenth century, and it fails for similar reasons.

By removing from religious observance all those things on which different faiths disagree, the school is left with an abstract impersonal God that nearly all faiths reject. What is left is unacceptable to many believers who take their own faith seriously.

The problem is as fundamental and intractable as the question of Whom to pray to. To pray to or in the name of Christ is a blasphemy to most Jews; not to do so is theologically and liturgically incorrect to most Christians. Is it better to silently affront the Christian majority by leaving Christ out of prayer, or to overtly offend the Jewish minority by praying in Christ's name? Given the sad history of Christian-Jewish relations, leaving Christ out is probably the lesser of the evils. This Court has said that leaving Christ out is constitutionally required. *Allegheny*, 492 U.S. at 603. But leaving Christ out of prayer is not a solution; it is at the core of the problem.

Whichever choice government makes, it endorses that choice. Government-sponsored prayer on public oc-

casions lends the weight of government practice to a preferred form of prayer. By their example, schools that leave Christ out of prayer endorse that practice as more tolerant, as more enlightened, as government approved. They lend the authority of government to a desacralized, watered-down religion that demands little of its adherents and offers them little in return.

The attempt to be inclusive amplifies the message of exclusion to those left out. Because such prayers are carefully orchestrated not to offend anyone who counts in the community, the message to those who are offended is that they do *not* count -- that they are not important enough to avoid offending. The message is:

We go out of our way to avoid offending people we care about, but we don't mind offending you. If you have a problem with this, you are too marginal to care about. This is our graduation, not yours.

It is not just nonbelievers who may be offended or excluded by the prayers in this case. These prayers also exclude serious particularistic believers, those who take their own form of prayer seriously enough that they do

not want to participate in someone else's form of prayer. There are still millions of Americans who believe that all religions are not equal, that their own religion is better, or even that their own religion is the one true faith, and that their faith should not be conglomerated into something that will not offend the great majority.

Those who would not pray at all, those who would pray only in private, those who would pray only after ritual purification, those who would pray only to Jesus, or Mary, or some other intermediary, those who would pray in Hebrew, or Arabic, or some other sacred tongue, are all excluded or offended by the prayers in this case. Those who object to the political or theological content of these prayers are similarly excluded – those whose vision of God is not the government's vision, those whose concept of God does not track the National Anthem, whose God is not "the God of the Free and Hope of the Brave," but perhaps the God of the oppressed and the Hope of the fearful.

On occasion, religious observances in public schools still produce ugly confrontations between those who object to least-common-denominator prayer and those who support it. A detailed account of such an incident appears in *Walter v. West Virginia Board of Education*, 610 F. Supp. 1169, 1172-73 (S.D. W. Va. 1985), where an eleven-year old Jewish child was condemned as a Christ killer because he did not appear to pray during a moment of silence. Most contemporary religious dissenters in public schools suffer in silence, and we have had no recent repetitions of the mob violence of the nineteenth century. But reduction of violence is not a reason to relax constitutional protections. Religious dissenters should not have to provoke violence to call attention to their constitutional rights.

The political content of the prayer in this case illustrates another core danger of established religion. When government sponsors religious observances, it appropriates religion to its own uses and unites religious and governmental authority. The message of Rabbi

Guttermann's invocation is an essentially political message -- that American government is good, that freedom is secure, that courts protect minority rights, that America is the land of the free and the home of the brave, etc. See J.A. 22.

The invocation's political message is popular but not uncontroversial. The school can deliver that political message if it chooses. The rabbi can deliver that message if he chooses. But the school and the rabbi cannot unite the authority and prestige of church and state in support of that message. The school cannot recruit a rabbi to wrap that political message in religious authority. The school cannot misappropriate the authority of the church to prop up the authority of the state.

It is a common observation that religion has thrived in America without an establishment, and declined in Western Europe with an establishment. It is less commonly observed that the established churches of colonial America declined in numbers and influence,

while the dissenting sects who insisted on rigorous disestablishment grew and flourished.

These long term religious trends reflect the baleful effects of government sponsorship. Religion does not benefit from public prayer that "degenerates into a scanty attendance, and a tiresome formality." Cf. Pet. Br. 32 n.33, quoting Madison's description of prayer in the early Congress. Government sponsorship of religion is always clumsy, and usually motivated more by political concerns than religious ones. In intolerant communities it tends inevitably toward persecution; in tolerant communities it tends inevitably toward desacralization. One function of the Establishment Clause is to avoid this dilemma.

V. For Reasons That Parallel the Analysis of Coercion, Government Proselytizing Is Not an Element of an Establishment Clause Violation.

In a recent dissent, Justice Kennedy proposed that the Establishment Clause might be satisfied if government refrained either from coercion or from proselytiz-

ing. *Allegheny*, 492 U.S. at 659, 661. The Court squarely rejected the proselytizing test, *id.* at 602-13, and neither Petitioners nor the United States has urged it here. Petitioners apparently believe that government may proselytize so long as it does not coerce. Even so, it seems prudent to briefly consider the proselytizing half of the rejected test.

With respect, these amici have only the vaguest idea which endorsements of religion would count as proselytizing. Apparently, proselytizing is a matter of degree. Some government endorsements of religion would be permitted, but persistent endorsements would be forbidden proselytizing, *id.* at 661 (Kennedy, J., dissenting), and presumably insistent endorsements or explicit calls to conversion would be forbidden proselytizing.

Much prayer would be proselytizing, which may be why Petitioners do not urge the proselytizing test. Prayers are an important, powerful, and frequent means of proselytizing. Evangelists lead their audience in prayer; proselytizers pray privately with individuals. No

one would doubt the proselytizing intent of a pastor at commencement who prayed "that the Holy Spirit pass through this class, and touch every heart, and lead these graduates to Jesus." There are endless variations of proselytizing more subtle than this example. Unless courts and school boards are to parse the content of prayers, the only way to avoid proselytizing at commencement is to avoid prayer at commencement.

More fundamentally, the proselytizing test violates the Establishment Clause for most of the same reasons a coercion test would violate the Establishment Clause. First, the proselytizing test is inconsistent with the original meaning of the clause. The bare endorsements of the South Carolina Constitution and the Virginia Episcopal incorporation act presumably did not amount to proselytizing, but they were establishments in the understanding of the founding generation.

Second, the proselytizing test is inconsistent with historical applications of the original principal. Reading the Bible "without note or comment" was an attempt to

avoid proselytizing as well as sectarian division. But as shown above at 27-30, this program was the source of bitter religious strife. Religious observances in the public schools, with or without overt proselytizing, led to the very evils the Establishment Clause was designed to prevent.

Third, the proselytizing test is inconsistent with this Court's precedents. From the beginning, this Court has properly insisted that government be neutral toward religion. Government was not to refrain merely from coercion, or from proselytizing, but from "persuasion," from "influence," from any "stamp of approval," from any departure from "neutrality." See 32-48 *supra*.

Fourth, government-sponsored religious observances inflict the same harms on religion whether or not government proselytizes. The vagueness of a proselytizing test may steer some governmental units away from the specific liturgy of any particular faith, but this will only reinforce the tendency to desacralization. There is no avoiding the central dilemma: when government

conducts religious rituals, it must conduct them in some concrete form, and whatever form it chooses is endorsed and tendered to the community as a model. For all these reasons, the proselytizing test is an inadequate protection for religious liberty.

VI. The Prayers and Practice at Issue in This Case Violate Both the Neutrality Standard and Any Plausible Coercion Standard.

Some of the amici joining in this brief believe that the harmful effects of government-sponsored religious observances inhere in any such observance, and that all such observances are unconstitutional. Others of the amici joining in this brief believe that some such observances are permitted, because in some cases, the effects of government endorsement are so attenuated that any advancement or inhibition of religion is not constitutionally significant.

This case does not require amici to resolve that disagreement, and it does not require the Court to draw fine lines. The religious practices in this case plainly

violate any version of the neutrality test; they even violate Petitioners' proposed coercion test.

An essential feature of this case is a captive audience of young children. It is not merely that children are in attendance, or that children want to be in attendance. It is also that the event is planned especially for children, to honor children on one of the major accomplishments of their young lives. Providence says to its high school graduates, and to its middle school promotees: if you wish to be honored on your promotion, you must first be "compelled to listen to the prayers" of others. *Cf. Wallace*, 472 U.S. at 72 (O'Connor, J., concurring).

As Respondent effectively shows, the children have no realistic choice but to sit through the prayers attentively and respectfully. They must give every outward appearance of joining in the prayers. This is not like a passive display, where people can "turn their backs." *Cf. Allegheny*, 492 U.S. at 664 (Kennedy, J., dissenting). Nor is it like a legislature, where adults come and go at will,

and can avoid the invocation by the simple expedient of arriving late.

Petitioners seem to assume there is no coercion unless children are compelled to *believe in* the religious premises of the prayers. See Pet. Br. 41 (heading 3). But that is absurd. That standard would permit the state to compel church attendance, or any other religious behavior. It is impossible to compel belief; outward manifestations of belief are all that the state can ever hope to compel. When the state compels children to give respectful attention to prayers, it has violated even the coercion test.

The prayers in this case are also especially problematic because of the state's role in planning and supervising the content of the prayers. School teachers plan the ceremony. They decide whether to include prayers, how many prayers, and at what point. They select the clergy to offer the prayers. They give the clergy "guidelines" to acceptable prayer. They call to make sure the clergy understand the guidelines. J.A. 12-13. Par-

ticipating clergy cannot avoid the inference that they are unlikely to be invited again if they depart from the guidelines. Government and religion are hopelessly entangled in this process. Just as "it is no part of the business of government to compose official prayers," *Engel*, 370 U.S. at 425, so it is no part of the business of government to prescribe official guidelines for prayer.

The teachers' central role in planning and supervising these prayers negates any claim that the clergyman they select is simply a private speaker. This case is wholly unlike *Board of Education v. Mergens*, 110 S. Ct. 2356 (1990), where there was no school sponsorship and a wholly voluntary audience. It is wholly unlike religious imagery in a commencement address by Martin Luther King, where a prominent public figure was invited to speak on any topic of his choice. *Cf.* Pet. Br. 8. Here, carefully selected clergy are invited solely to pray, at times designated by the school and in accordance with liturgical guidelines imposed by the school.³

³ Religious amici supporting Petitioners do so principally on the implausible theory that these prayers

This is not a free speech case or an equal access case. It is a school prayer case, plain and simple. In terms of school sponsorship, government entanglement, and coercion of children, this case is indistinguishable from *Engel* and *Schempp*. It differs from those cases only in the frequency of the constitutional violation. If this Court holds that school prayer is permitted occasionally but not daily, it will be faced with a long series of cases asking how often is too often, and which occasions are special enough. If commencement is exempt from the school prayer cases, what about holidays, student assemblies, athletic events, pep rallies, and any other day on which an "occasion" can be identified?

School-sponsored and school-supervised prayer is not the only way to take religious note of graduation. A private baccalaureate service, sponsored by the local

were somehow an exercise of private free speech in a public forum. Christian Legal Society Br. 4-21; Rutherford Institute Br. 3-18; U.S. Catholic Conf. Br. 4-28. Few if any religious leaders are willing to defend government direction of religious observances.

association of churches and synagogues, is the obvious constitutional alternative. Unsponsored student groups exercising their rights under *Mergens* might organize religious observances of the occasion. Either of these alternatives would leave religious worship in religious hands, either would avoid coercion of young children, and either would avoid government sponsorship.

Conclusion

The judgment below should be affirmed. This Court's settled rule that government must be neutral toward religion should be reaffirmed.

Respectfully submitted,

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APPENDICES

INTERESTS OF THE INDIVIDUAL AMICI CURIAE

APPENDIX A

INTERESTS OF THE AMICI

The American Jewish Committee ("AJC"), a national organization founded in 1906, is dedicated to the defense of religious rights and freedoms of all Americans. AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty and has proved of inestimable value to the free exercise of religion in our pluralistic society. In support of this vital principle, AJC through the years has filed numerous briefs in the Court. We do so again in the conviction that religious observances of any kind do not belong in public schools.

* * *

The American Jewish Congress is an organization of American Jews dedicated to the preservation of the political, civil, economic and religious rights of American Jews and, indeed, all Americans. To this end, it has filed numerous briefs in this and other courts in cases implicating the religion clauses of the First Amendment.

— The American Jewish Congress believes that religious ceremonies of whatever kind have no place in the nation's public schools. It believes that the ceremony at issue here amounted to a compulsory church service incompatible with the Establishment Clause of the First Amendment.

. . .

James E. Andrews, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with approximately 11,500 congregations organized into 172 presbyteries under the jurisdiction of 16 synods.

— This brief is consistent with the policies adopted by the General Assembly regarding the Establishment Clause of the First Amendment. The 200th General Assembly of the Presbyterian Church (U.S.A.) squarely addressed this issue in 1988:

We believe that the establishment clause requires government to be wholly neutral in matters of religion. Government may not require adher-

ence to a particular religious belief, designate an official state church, or endorse a religion. Government may not sponsor religious observances or grant financial aid to religion. Nor may government support religion in some generic fashion that is allegedly nonpreferential. No support of religion could be nonpreferential in a society as religiously diverse as ours. At best the government would support a broad group of somewhat similar majority religions, with the inevitable result that nonbelievers and members of religious minorities are excluded. Actual or symbolic exclusion of such minorities is inconsistent with one great purpose of the establishment clause: to affirm that every individual can be a full member of the civil polity whatever his or her religious belief.

God Alone Is Lord of the Conscience, A Policy Statement Adopted by the General Assembly (1988) Presbyterian Church (U.S.A.) 7-8.

The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

The Anti-Defamation League was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

In support of this principle, ADL has previously filed as friend-of-the-court in numerous cases dealing with prayer and religious activities in public school settings, see, e.g., *Mergens v. Board of Education*, 110 S.Ct. 2356 (1990); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); and *Abington v. Schempp*, 374 U.S. 203 (1963). The League believes such activities in public schools pose serious questions concerning government support for or endorsement of

religion in contravention of the establishment clause of the First Amendment.

As a national organization dedicated to safeguarding all persons' religious freedoms, the Anti-Defamation League joins the accompanying brief because we believe the rights of minority religions are no less at stake in the establishment clause cases than in free exercise cases. History has demonstrated that the inevitable result of a union of government and religion is the destruction of freedom for those who believe differently from the majority. ADL, therefore, has consistently advocated a strict interpretation of the establishment clause, in order to protect "our remarkable and precious religious diversity as a nation." *Lynch v. Donnelly*, 103 S.Ct. 1355, 1371 (Brennan, J., dissenting).

* * *

The Baptist Joint Committee on Public Affairs is composed of representatives from various national cooperating Baptist conventions and conferences in the United States and deals exclusively with issues pertaining

to religious liberty and church-state separation. These organizations include: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various conventions and associations. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists. (It should be noted that the Christian Life Commission of the Southern Baptist Convention has filed an amicus brief in support of Petitioners.) Although the Baptist Joint Committee believes the principle of governmental neutrality embodied in *Lemon* should be preserved and that the instant prayers violate that standard, we do not hereby contest the constitutionality of public ceremonial prayer in general.

* * *

The Committee for Public Education and Religious Liberty (PEARL), founded in 1966, is a coalition of organizations and individuals committed to the preservation of the dual principle of the separation of church and state and the free exercise of religion, as they relate to or affect education in the State of New York. To effectuate its purpose PEARL has instituted suits, submitted briefs amicus curiae, testified before federal and state legislative and administrative bodies and engaged in general educational programs for the community. Members of PEARL participating in this brief are listed in Appendix C.

* * *

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church, which has more than 6.6 million members worldwide, including 760,000 in the United States.

The Church believes that the freedom of conscience includes the right to worship or not to worship, and to profess, practice, and promulgate religious beliefs or to change them. In exercising these rights, however, it admonishes that government should respect the rights of all citizens, not just those of the majority.

The Church has historically maintained that religious liberty is best exercised when church and state are separate.

* * *

The National Council of Churches of Christ in the U.S.A. is a community of thirty-two Protestant and Eastern Orthodox communions having an aggregate membership in the U.S. of over forty million. Its positions on public issues are taken on the basis of policies developed by its General Board, composed of some two hundred and fifty members selected by its member communions in proportion to their size and support of the Council.

Since 1963, the National Council of Churches has supported the decisions of this Court holding state-sponsored prayer in public schools to be violative of the Establishment Clause of the First Amendment, and it has been active in resisting seven successive efforts to amend the Constitution to reverse those decisions. It has also supported the Equal Access Act, which provides that students in public secondary schools may participate in student-initiated and student-led extracurricular activities that may involve religious speech.

The National Council's policies on these matters, however, contemplate that there may be special occasions when prayer may be appropriate in public schools, and that that determination should be left to public school authorities. Since commencement exercises may be such special occasions -- of an infrequent and noncurricular nature -- amicus National Council of Churches does not express a view concerning the constitutionality of the practice at issue in this case. Its sole purpose in joining this brief amici curiae is to

oppose the proposal of the Solicitor General that the long-accepted *Lemon* test of establishment be abandoned for a low-threshold "coercion" test that would render its scope indistinguishable from that of the Free Exercise Clause.

. . .

The National Jewish Community Relations Council (NJCRAC) is an umbrella organization consisting of the following national member organizations: American Jewish Committee, American Jewish Congress, B'Nai B'rith, Anti-Defamation League of B'Nai B'rith, Hadasah, Jewish Labor Committee, Jewish War Veterans of the United States of America, National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of America, Women's League for Conservative Judaism, Women's American ORT; as well as 117 community member agencies representing all major Jewish communities in the United States, listed in Appendix B. As the national planning

and coordinating body for the field of Jewish community relations, dedicated to preserving the principles embodied in the Bill of Rights, the NJCRAC believes that the separation of church and state is an essential bulwark in maintaining the individual, group, and political equality of all Americans.

* * *

People for the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms and religious liberty. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has over 290,000 members nationwide.

* * *

The Union of American Hebrew Congregations (UAHC) representing 850 synagogues with a membership of 1.5 million Reform Jews throughout the United States and Canada has, from its inception 120 years ago,

been deeply committed to the principle of religious liberty and freedom. Through its member congregations, the UAHC works in communities across the United States to ensure through the strengthening of the separation of church and state that religious freedom for all would never be abridged.

APPENDIX B
MEMBER ORGANIZATIONS OF
THE NATIONAL JEWISH COMMUNITY
RELATIONS ADVISORY COUNCIL

Birmingham JCC

Greater Phoenix Jewish Federation

Tucson Jewish Federation of Southern Arizona

Greater Long Beach and West Orange County

Jewish Community Federation

Los Angeles CRC of Jewish Federation-Council

Oakland Greater East Bay JCRC

Orange County Jewish Federation

Sacramento JCRC

San Diego CRC of United Jewish Federation

San Francisco JCRC

Greater San Jose JCRC

Greater Bridgeport Jewish Federation

Greater Danbury CRC of Jewish Federation

Eastern Connecticut Jewish Federation

Greater Hartford CRC of Jewish Federation

New Haven Jewish Federation
Greater Norwalk Jewish Federation
Stamford United Jewish Federation
Waterbury Jewish Federation
JCRC of Connecticut
Wilmington Jewish Federation of Delaware
Greater Washington JCC
South Broward Jewish Federation
Greater Fort Lauderdale Jewish Federation
Jacksonville Jewish Federation
Greater Miami Jewish Federation
Greater Orlando Jewish Federation
Palm Beach County Jewish Federation
Pinellas County Jewish Federation
Sarasota-Manatee Jewish Federation
South County Jewish Federation
Atlanta Jewish Federation
Savannah Jewish Council
Metropolitan Chicago JCRC of the Jewish United Fund
Peoria Jewish Federation

Springfield Jewish Federation

Indianapolis JCRC

South Bend Jewish Federation of St. Joseph Valley

JCRC of Indiana

Greater Des Moines Jewish Federation

Lexington Central Kentucky Jewish Federation

Louisville Jewish Community Federation

Greater Baton Rouge Jewish Federation

Greater New Orleans Jewish Federation

Shreveport Jewish Federation

Portland Southern Maine Jewish Federation-Community
Council

Baltimore JCRC

Greater Boston JCRC

Marblehead North Shore Jewish Federation

Greater New Bedford Jewish Federation

Springfield Jewish Federation

Worcester Jewish Federation

Metropolitan Detroit JCC

Flint Jewish Federation

Minneapolis Minnesota and Dakotas JCRC-

Anti-Defamation League

Greater Kansas City Jewish Community Relations

Bureau

St. Louis JCRC

Omaha JCR Committee of Jewish Federation

Atlantic County Federation of Jewish Agencies

Central New Jersey Jewish Federation

Clifton-Passaic Jewish Federation

Delaware Valley Jewish Federation

Metrowest United Jewish Federation

Greater Middlesex County Jewish Federation

Northern New Jersey JCRC

Southern New Jersey JCRC of Jewish Federation

Albuquerque JCC

Binghamton Jewish Federation of Broome County

Greater Buffalo Jewish Federation

Elmira CRC of Jewish Welfare Fund

Greater Kingston Jewish Federation

New York JCRC

Northeastern New York United Jewish Federation

Greater Orange County Jewish Federation

Rochester Jewish Community

Syracuse Jewish Federation

Utica Jewish Federation

Akron Jewish Community Federation

Canton Jewish Community Federation

Cincinnati JCRC

Cleveland Jewish Community Federation

Columbus CRC of Jewish Federation

Greater Dayton CRC of Jewish Federation

Greater Toledo CRC of Jewish Federation

Youngstown JCRC of Jewish Federation

Oklahoma City JCC

Tulsa JCC

Portland Jewish Federation

Allentown CRC of Jewish Federation

Erie JCC

Greater Philadelphia JCRC

Pittsburgh CRC of United Jewish Federation

Scranton-Lackawanna Jewish Federation
Greater Wilkes-Barre Jewish Federation
Providence CRC of Rhode Island Jewish Federation
Charleston JCR Committee
Columbia CRC of Jewish Welfare Federation
Memphis JCRC
Nashville and Middle Tennessee Jewish Federation
Austin JCC
Greater Dallas JCRC of Jewish Community Federation
El Paso JCR Committee
Fort Worth Jewish Federation
Greater Houston Jewish Federation
San Antonio JCR of Jewish Federation
Newport News-Hampton United Jewish Community of
the Virginia Peninsula
Richmond Jewish Community Federation
Tidewater United Jewish Federation
Greater Seattle Jewish Federation
Madison JCC
Milwaukee Jewish Council

APPENDIX C
MEMBERS OF
THE COMMITTEE FOR PUBLIC EDUCATION
AND RELIGIOUS LIBERTY
PARTICIPATING IN THIS BRIEF

American Ethical Union

American Jewish Congress

Americans for Democratic Action

Americans for Religious Liberty

Anti-Defamation League of B'Nai B'rith

A. Philip Randolph Institute

Aspira of New York, Inc.

Association of Reform Rabbis of New York and Vicinity

Citizens Union of the City of New York

City Club of New York

Community Church of New York, Social Action
Committee

Community Service Society

Council of Churches of the City of New York

Council of Supervisors and Administrators

Episcopal Diocese of L.I., Committee on Social
Concerns and Peace

Humanist Society of Metropolitan New York, Inc.

Jewish War Veterans, Department of New York

League for Industrial Democracy, New York City

Chapter

National Council of Jewish Women New York Section

National Service Conference of the American Ethical

Union

New York Jewish Labor Committee

New York Society for Ethical Culture

New York State Congress of Parents and Teachers

Rochester Chapter of Americans United for Separation
of Church and State

Social Concerns Work Area, St. Paul's Methodist

Church, Northport, New York

Union of American Hebrew Congregations, New York

Federation of Reform Synagogues

Unitarian-Universalist Ministers Association of

Metropolitan New York

United Americans for Public Schools

United Community Centers, Inc.

United Federation of Teachers

United Parents Associations

United Synagogue of America, New York Metropolitan
Region

Women's City Club of New York, Inc.

Workmen's Circle, New York Division

90-1014

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BRIEF OF AMICI CURIAE
SPECIALTY RESEARCH ASSOCIATES, INC.
FREE CONGRESS RESEARCH & EDUCATION
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No. 90-1448

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**BRIEF OF AMICI CURIAE
SPECIALTY RESEARCH ASSOCIATES, INC.
FREE CONGRESS RESEARCH & EDUCATION
FOUNDATION IN SUPPORT OF PETITIONERS**

INTEREST OF THE AMICI

Specialty Research Associates, Inc., a research group based in Aledo, Texas, researches in two primary spheres: (1) historical incidents/policies pertinent to issues today; (2) statistical effects of varying educational policies on students/schools today. Amicus files this brief believing that the Court's consideration of the issue of invocations/benedictions in public schools should be accompanied by (1) an understanding of actions taken by the First Congress concurrently with the formation of the First Amendment and (2) an understanding drawn from Founders' writings of the impact that this Court's decision may have on America's youth.

Free Congress Research & Education Foundation, a non-profit foundation, seeks to advance fundamental principles of judicial restraint and the rule of law. Among these is consistent application of traditional rules of constitutional interpretation. The proper role for courts is settlement of legal disputes by faithful application of the law to the facts of particular cases. Only then can social policy

develop as it should, free from far-reaching decisions by courts more affected by politics than law. Amicus believes this case presents an opportunity to insist on traditional canons of interpretation.

SUMMARY OF THE ARGUMENT

In this case, the district court invalidated the long-standing practice at Nathan Bishop Middle School of allowing clergy to offer an invocation and benediction at the annual graduation ceremony on the narrow ground that the prayer used at the 1989 graduation ceremony invoked a deity.¹ It thus failed the second prong of the three-part test in *Lemon v. Kurtzman*,² which requires that the primary effect of a challenged practice neither advance nor inhibit religion.³ The court of appeals saw no reason to elaborate further.⁴

This result stands in stark contrast to the original understanding of the non-establishment clause of the First Amendment, which states that "Congress shall make no law respecting an establishment of religion." By that provision, the Founders sought to encourage an open and active non-coercive role for religion in public life.

Any interpretive approach or analytical framework that avoids determining the Founders' original understanding of the First Amendment cannot remain true to the Constitution. Any conclusion that demands rigid separation of religion from public life or exclusion of voluntary religious practices from education cannot remain true to history. Amici believe that the *Lemon* test is true to neither. This Court should reject it in favor of faithfully applying the original understanding of the non-establishment clause in cases such as this.

ARGUMENT

I. HISTORICAL ANALYSIS IS CENTRAL TO PROPER RESOLUTION OF THIS CASE

This Court has said that any interpretation of the non-establishment clause must "comport [] with what history reveals was the contemporaneous understanding of its guarantees."⁵ Justice William Brennan wrote that "the line we must draw...is one

1. *Weisman v. Lee*, 728 F.Supp. 68, 69 (D.R.I. 1990)

2. 403 U.S. 603 (1971)

3. *Weisman*, 728 F.Supp. at 71.

4. *Weisman v. Lee*, 908 F.2d 1090, 1090 (1st Cir. 1990)

5. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)

which accords with history and faithfully reflects the understanding of the Founding Fathers."⁶ This Court's non-establishment clause cases "have recognized the special relevance in this area of Mr. Justice Holmes' comment that 'a page of history is worth a volume of logic.'"⁷ The Court has sought to determine the "meaning and scope" of the non-establishment clause "in the light of its history and the evils it was intended forever to suppress."⁸ Two decades ago, this Court held that "[t]he more longstanding and widely accepted a practice, the greater its impact upon constitutional analysis."⁹ Indeed, this Court has sought to determine the meaning of the non-establishment clause by reference to the understanding of those who framed and ratified it.¹⁰ Amici agree with Chief Justice Rehnquist that "[i]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history."¹¹

In his opinion below, Judge Bownes suggested that no reliable information exists about the ideas informing the framing and ratifying of the Constitution, the original understanding of the non-establishment clause, or the relationship between traditional religious practices and that original meaning.¹² Amici respectfully submit, and the jurisprudence of this Court affirms, that this is simply not the case. Indisputable facts exist that help determine the Founders' understanding of the non-establishment clause. These include, but are not limited to, the specific facts or colonial conditions existing in the late 1780s. It is, after all, the Founders' *meaning*, not simply their subjective intention or factual knowledge, that this Court must apply in the present case. Thomas Jefferson stated well this fundamental interpretive principle:

On every question of construction, [we must] carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what

6. *School Dist. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring).

7. *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 777 n. 33 (1973), quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

8. *Everson v. Board of Education*, 323 U.S. 1, 14-15 (1947).

9. *Waltz v. Tax Commission*, 397 U.S. 664, 681 (1970).

10. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (Rehnquist, J., dissenting); *Lynch*, 465 U.S. at 673-78; *Everson*, 330 U.S. at 8-15.

11. *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting).

12. *Weisman*, 908 F.2d at 1092.

meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.¹³

II. THIS COURT HAS RECENTLY SUBSTITUTED AN ANTI-HISTORICAL APPROACH

Despite the overwhelming and consistent historical evidence that the Founders were motivated by religious principles, openly encouraged religion in public life, and even required religious instruction in schools, some of which is reviewed herein, this Court has recently adopted an anti-historical approach in cases involving the non-establishment clause. That approach has produced novel results. As Justice William Douglas noted: "It was, for example, not until 1962 that...prayers were held to violate the Establishment Clause."¹⁴

The first chapter in this departure from the traditional approach occurred less than 50 years ago when the Court injected for the first time as the central tenet of non-establishment clause jurisprudence the notion of a "'wall of separation between church and State'."¹⁵ The only precedent cited for this notion was a case involving the free exercise clause. This phrase comes from a personal letter written decades after ratification of the First Amendment by someone who spent the years surrounding the framing and ratifying of that provision overseas. Justice Stanley Reed wisely cautioned that "[a] rule of law should not be drawn from a figure of speech."¹⁶ Chief Justice Rehnquist has aptly called it a "misleading metaphor."¹⁷

The second chapter in the departure from an historical approach came with the Court's creation of a three-part test for evaluating the constitutionality of direct government aid to explicitly religious institutions. Whether appropriate within that narrow context or not, this test from *Lemon v. Kurtzman* hinders rather than helps faithful application of the original understanding of the First Amendment.

13. Samuel J. Knoefsky, *John Marshall and Alexander Hamilton: Architects of the American Constitution* (1964), p. 51. This contradicts Judge Bownes' astounding assertion that the Founders thought their intentions irrelevant in constitutional interpretation. *Weisman*, 908 F.2d at 1093.

14. *Walz*, 397 U.S. at 702 (Douglas, J., dissenting)

15. *Everson*, 330 U.S. at 16, quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879).

16. *McCullum v. Board of Educ.*, 333 U.S. 203, 246 (Reed, J., dissenting).

17. *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting).

A. The *Lemon* Test Cannot Be Applied Faithfully and Consistently to Cases Involving Religious Practices in Public Life

Lemon involved direct government aid to overtly religious institutions, clearly the most constitutionally sensitive context. Outside that context, walls of separation and rigid multi-pronged tests are unnecessary to faithfully determine and apply the original understanding of the First Amendment. When the federal courts can, applying traditional canons of interpretation, take advantage of external historical sources rather than internal logical inventions, they must do so. Choosing a different course not only substitutes the Court's own preferences for the Founders' original understanding of the Constitution, but invites inconsistent application and confusion among the lower courts.

For example, using the *Lemon* test to invalidate a public school invocation requires a court to ignore the long-standing historical practice of invocations used by all three branches of government. This Court opens each day with an invocation; both houses of Congress have chaplains and open their sessions with prayer; President George Bush's 1989 inauguration ceremony began with prayer and he recently continued a tradition by declaring a National Day of Prayer. In his dissenting opinion below, Judge Campbell noted that "[t]here is a tradition of such remarks at public functions going back to the Founders."¹⁸ At the 10th Annual Presidential Prayer Breakfast, President John F. Kennedy said that prayer is "much a part of our American heritage."¹⁹

Applying the *Lemon* test outside its originally narrow context has created confusion in this Court's jurisprudence as well. It produces multiple opinions in individual cases,²⁰ as well as supposed constitutional rules of dubious logic.²¹ This Byzantine jurispru-

18. *Weisman*, 908 F.2d at 1098 (Campbell, J., dissenting).

19. *Public Papers of the President of the United States Containing the Public Messages, Speeches and Statement of the President, January 1 to December 31, 1960* (1963), pp. 175-76.

20. See, e.g., *County of Allegheny v. American Civil Liberties Union*, 109 S.Ct. 3086 (1989). In this case, the Court held that displaying a Nativity scene violated the non-establishment clause while displaying a menorah was permissible. Only two members of the Court could agree with both conclusions.

21. See, e.g., *Lynch*, 465 U.S. 668 (1984), in which the Court upheld a Nativity display because Santa Claus was present.

dential structure results not from faithful application of the original understanding of the First Amendment but of an artificial "test" created by this Court that has even potentially proper use only in a very narrow and specific context.

B. The *Lemon* Test Invites Hostility to Religion and Prevents the Courts from Faithfully Applying the Original Understanding of the First Amendment

The historical analysis herein invites at least one overwhelming conclusion. The Founders sought a positive and encouraging role for religion in public life while preserving freedom for individual belief and practice. Yet the *Lemon* test reflects actual hostility toward religion and demands a secularism that the Founders would consider repugnant to both religious liberty and good government.

This Court held in *Lemon* that "the [challenged] statute must have a secular legislative purpose."²² One question, left aside here, is how this test applies when, as in the present case, no statute or legislative purpose exists. This Court has alternately stated this prong of the *Lemon* test to require that "there [be] no question that the statute or activity was motivated *wholly* by religious considerations."²³ Nevertheless, in his opinion below, Judge Bownes misinterpreted *Lemon* to require that "the *predominant* purpose of the practice [be] secular."²⁴ How can something this Court has called "a primary religious activity in itself"²⁵ have a predominantly secular purpose? Such logical semantic gamesmanship flies in the face of this nation's traditions and attacks the credibility and integrity of this Court.

This Court's past holdings that, despite all the historical evidence to the contrary, the First Amendment requires "neutrality between... religion and nonreligion"²⁶ and "between believers and nonbelievers,"²⁷ invites this metamorphosis in the *Lemon* test. Such "neutrality" has neither historical²⁸ nor logical support. Why is the absence of prayers or the complete removal of any religious reference from

22. *Lemon*, 403 U.S. at 612 (emphasis added).

23. *Lynch*, 465 U.S. at 680 (emphasis added).

24. *Weisman*, 908 F.2d at 1094 (emphasis added).

25. *Wallace*, 472 U.S. at 44 n. 22.

26. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

27. *Waltz*, 392 U.S. at 716.

28. See *Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting): "The Establishment Clause did not require government neutrality between religion and irreligion."

them any more neutral between the secular and the sacred than the invocation in the present case? It is not. Are legislative prayers any more "neutral" than graduation prayers? This misleading notion effects a subtle shift in doctrine and application that eventually has institutionalized and perhaps constitutionalized hostility to religion.

Moreover, the hostility inherent in the *Lemon* test has resulted in every conceivable argument to cast this quintessential religious practice as a secular exercise. Why? Because the Constitution requires ignoring reality? No, because the *Lemon* test is inherently hostile to religion in a way the Constitution is not. This explains the supposed "irony" noted by Judge Bownes in his opinion below of religious groups arguing that prayer is "merely ceremonial."²⁹ They must make such arguments in attempting to make a constitutional practice pass precedential muster. This means that *Lemon* actually repudiates the original understanding, as summarized by this Court nearly two decades before:

When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.³⁰

The second prong of the *Lemon* test states that a practice's "principal or primary effect must be one that neither advances nor inhibits religion."³¹ This Court has provided an alternative phrasing of the effect prong: "Government promotes religion...when it fosters a *close* identification of its powers and responsibilities with those of any--or all--religious denominations."³² As with the first prong, courts have given this test an increasingly religion-hostile interpretation. Judge Bownes in his opinion below put this spin on it: "The purpose prong...asks whether the government's actual pur-

29. *Weisman*, 908 F.2d at 1095 n. 13.

30. *Zorach v. Clauson*, 343 U.S. 306, 313-314 (1952).

31. *Lemon*, 403 U.S. at 612.

32. *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 389 (emphasis added).

pose is to endorse or disapprove of religion."³³ However, divorced as this analysis is from the original understanding of the First Amendment, it has produced a conclusion that the literal presence of prayer, or even the opportunity for individuals to pray silently, constitutes improper identification.

Only two options exist for prayer - presence or absence - just as two options exist for religion - religion or non-religion. If presence or identification alone means endorsement, absence must mean disapproval. Any decision about prayer, whether to allow or prohibit it, will therefore be to endorse it or disapprove it, to advance it or inhibit it. These dual portions of the second *Lemon* prong are mutually exclusive.

The courts below invalidated the invocation in the present case under this prong.³⁴ The district court held that the invocation created "[a]n identification of school with a deity, and therefore religion."³⁵ Is this identification any less significant in a legislature, a presidential inauguration, or this Court? Since the Founders, as discussed herein, required religious instruction in American schools, it cannot be said that they would object to the mere "identification" of school with religion. This second prong of *Lemon* is divorced from the lessons of history and from the original understanding of the First Amendment. It is inherently anti-religion. This Court should instead adhere to its holding last year that "the schools do not endorse everything they fail to censor."³⁶

The third *Lemon* prong states that "the statute must not foster an excessive government entanglement with religion."³⁷ On its face, given the Founders' view of religion and the original understanding of the First Amendment, government involvement and even encouragement or facilitation of religion is not impermissible. Because the *Lemon* test is divorced from that understanding and permits courts to fashion their own rules for implementing this religion-hostile test, courts are in a position to micro-manage religious practices. Judge Nelson dissented from an invalidation of a Nativity scene and wrote: "I question whether it is appropriate for

33. *Weisman*, 908 F.2d at 1094.

34. *Weisman*, 728 F.Supp. at 71.

35. *Id.*

36. *Board of Educ. of the Westside Community Schools v. Mergens*, 110 L.Ed.2d 191, 216 (1990).

37. *Lemon*, 403 U.S. at 613, quoting *Walz*, 392 U.S. at 674.

the federal courts to tell the towns and villages of America how much paganism they need to put in their Christmas decorations."³⁸ This micro-management, requiring as it does screening of curricula, programs, and practices, has given the courts "the role of a super board of education for every school district in the nation."³⁹ It is this role that has caused an ongoing, excessive, and intrusive government entanglement with religion.

This Court has said that it is not to be involved in parsing the content of religious activities,⁴⁰ but the courts have been in just that position, drawing distinctions of constitutional significance based on individual words or phrases.⁴¹ The only way to determine the "secular effect" of a prayer is to examine its contents. School officials sometimes actually use pamphlets detailing steps for secularizing prayers.⁴² It is the dictates of *Lemon*, not the original meaning of the First Amendment, that produces such micro-managing entanglement. Yet it is the First Amendment, rather than misapplied and historically flawed precedent, that should govern in this area.

As in cases such as *Marsh*, this Court has bypassed the *Lemon* test altogether in order to uphold practices such as legislative prayers. Justice Brennan wrote in *Marsh* that "if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional."⁴³ The fault lies with *Lemon* and its rejection of the original understanding of the First Amendment and its inherent hostility to religion, not with the First Amendment itself.

38. *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561, 1569 (6th Cir. 1986) (Nelson, J., dissenting).

39. *McCullum*, 203 U.S. at 237 (Jackson, J. concurring).

40. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983).

41. "A Sixth Circuit panel struck down a school invocation and benediction... [because] the content of the prayer in question violated the Establishment Clause because it was not sufficiently non-denominational." *Weisman*, 908 F.2d at 1096; the *Stein* court explained the problem with the prayer: "The invocations and benedictions delivered...employ...the language of Christian theology and prayer. Some expressly invoke the name of Jesus as the Savior." *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1410 (6th Cir. 1987).

42. "Appellants make much of the fact that the school has chosen to give a suitably non-denominational prayer because school officials distributed a pamphlet entitled 'Guidelines for Civic Occasions.' These guidelines suggest what kind of prayer should be written." *Weisman*, 908 F.2d at 1095.

43. *Marsh*, 463 U.S. at 800-01 (Brennan, J., dissenting).

III. THIS COURT SHOULD RETURN TO APPLYING THE ORIGINAL UNDERSTANDING OF THE FIRST AMENDMENT IN THESE CASES

A. Abandoning the *Lemon* Test Would Allow Consistent Application of the Original Understanding

A majority of this Court has expressed dissatisfaction with the manifestly anti-historical and artificial approach of *Lemon*. Justice White has said that faithful application of the proper historical approach would make "quite understandable" a reassessment of this Court's precedents that conflict with that approach.⁴⁴ Justice Kennedy has said that "[s]ubstantial revision of our Establishment Clause doctrine may be in order."⁴⁵ Chief Justice Rehnquist has said that the *Lemon* test is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results."⁴⁶ Justice O'Connor has expressed "doubts about the entanglement test" of *Lemon*⁴⁷ while Justice Scalia has said that a "pessimistic evaluation...of the totality of *Lemon* is particularly applicable to the 'purpose' prong."⁴⁸

Justice Brennan wrote that jurisprudence in the non-establishment context must accord with history and faithfully reflect the understanding of the Founders.⁴⁹ Thus an approach which makes such faithful reflection impossible must be reassessed. The *Lemon* formulation, based as it is on a contemporary view insisting on a separation not of church and state but of religion and public life, cannot meet this test. The *Lemon* test prevents this Court from applying the original understanding.

Since that must be the lynchpin of the court's jurisprudence in this context, amici urge this Court, if it chooses to retain the *Lemon* test, to restrict its application to the context which generated it--direct government aid to explicitly religious institutions. Amici urge the Court to return to application of the original understanding

44. *Wallace*, 472 U.S. at 91. See also *Roemer v. Board of Public Works*, 426 U.S. 736, 768 (1976) (White, J., concurring in the judgment): "I am no more reconciled now to *Lemon I* than I was when it was decided."

45. *County of Allegheny*, 109 S.Ct. at 3134.

46. *Wallace*, 472 U.S. at 112.

47. *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting).

48. *Edwards v. Aguillard*, 482 U.S. 578, 636 (Scalia, J., dissenting).

49. *School Dist. v. Schempp*, 374 U.S. at 294 (1963) (Brennan, J., concurring).

of the First Amendment in other cases implicating the non-establishment clause.

The Founders sought both to encourage religion generally and to preserve religious liberty. Their guiding principle in striking this balance was non-coercion. For example, James Madison's public proclamations while President reveal a strong endorsement and encouragement of religious principles accompanied by similarly strong declarations of non-compulsion and non-coercion.⁵⁰ The state constitutions authored by the Founders during and subsequent to the federal document have the same emphasis: an open declaration of the duty of every citizen to acknowledge God immediately followed by a non-coercion clause.

B. Abandoning the *Lemon* Test in Favor of the Original Understanding Would Once Again Allow Practices and Activities the Founders Sought to Encourage and Which Can Benefit Society

By adopting the religion-hostile *Lemon* test, the federal courts have removed from our society activities the Founders wholeheartedly endorsed and encouraged. The Founders predicted the consequences of expunging God from the national consciousness. George Washington warned of a loss of "security for life, liberty, property without a sense of religious obligations."⁵¹ John Adams said that there was no "power capable of contending with human passions unbridled by morality and religion"⁵² Daniel Webster maintained that "the cultivation of the religious sentiment represses licentiousness...inspires respect for law and order"⁵³ Thomas Jefferson believed that our very liberties cannot be secure if "we have removed their only firm basis, a conviction in the minds of the people that these liberties are...the gift of God."⁵⁴

50. *Messages and Papers of the Presidents* (1899), Vol. 1, pp. 513, 532, 558, 561.

51. *Id.*, Vol. 1, p. 220.

52. J. Adams, *The Works of John Adams, Second President of the United States*, collected by Charles Francis Adams (1854).

53. D. Webster, *The Works of Daniel Webster* (1853), Vol. II, p. 615, from Daniel Webster's address at the dedication of the addition to the Capitol building while he was Secretary of State.

54. T. Jefferson, *Notes on the State of Virginia, Query XVIII*.

The Founders' predictions have been realized. Radio newsbroadcasts on April 29, 1991, reported that 65 percent of violent crime is committed by minors. In his opinion below, Judge Campbell wrote:

If one were to ask people what are the problems of our time, they would hardly respond that our youth and their parents are being corrupted by over-exposure to noble aspirations [represented by graduation invocations]. The common complaints are that 13 year-old children are selling crack; that instead of doing homework, students are watching violent TV; that the tolerant ideals mentioned by the rabbi are being rejected in favor of destructive habits of mind and character. So what good, one might ask, is accomplished by preventing an invocation like this?⁵⁵

Congressman Tony Hall stated recently: "More than 130,000 teachers are assaulted by their students each year. In the last 15 years, the rate of teen suicides has gone up by 50. By the end of high school 61 percent of our students will have used drugs."⁵⁶ The first four months of the current academic year witnessed more than 4,300 arrests in the Chicago public schools for offenses ranging from disorderly conduct to battery and weapons violations.⁵⁷ A recent study showed that the abortion rate for girls under 15 years of age rose 18 percent during the 1980s, mainly because of increased teenage sexual activity.⁵⁸

IV. THE FOUNDERS EXPLICITLY CONTEMPLATED A ROLE FOR RELIGION IN EDUCATION

Rejecting the artificial *Lemon* test and returning to the original understanding of the First Amendment reveals a body of evidence affording a clear basis for reversing the court below.

A. Prominent Founders Clearly Expressed Their Understanding of the Role of Religion in Education

This Court has looked to James Madison and Thomas Jefferson when determining the original understanding of the First Amend-

55. *Weisman*, 908 F.2d at 1098.

56. 135 *Congressional Record* (January 31, 1989).

57. "School Arrests Net 4,306 In Four Months," *Chicago Sun-Times*, January 16, 1991, pp. 1, 4.

58. "Abortion Rate Rose in '80s for Girls Under 15," *Washington Post*, April 25, 1991, p. A10.

ment. Early historical works, however, identify at least 243 "Founding Fathers" influential in the development of constitutional government.⁵⁹ Many of these made equal or greater contributions to the First Amendment.⁶⁰ Fifty-five individuals worked directly to produce the Constitution and 90 members of the First Congress formulated the Amendments. Most were prolific writers who left a significant heritage of their writings.⁶¹ They are equally or more important as authorities on the original understanding of the First Amendment than Jefferson, who was in France at the time and did not directly participate in the Constitutional Convention, the Congress which formulated the Bill of Rights, or the process of ratifying those instruments.

James Wilson was the second most active member of the Constitutional Convention, speaking 168 times. He signed both the Declaration of Independence and the Constitution and President George Washington appointed him to the Supreme Court in 1789. As the first professor of law at the College of Philadelphia, Wilson's lectures "enunciated the arguments Chief Justice John Marshall later used" and "remain landmarks in the history of American jurisprudence."⁶² The Supreme Court of Pennsylvania cited Wilson's *Course of Lectures* as insight on the original understanding of the First Amendment:

The late Judge Wilson, of the Supreme Court of the United States...had just risen from his seat in the convention which formed the constitution of the United States, and of this state; and it is well known, that for our present form of government

59. See E. S. Brooks, *Historic Americans* (1899); B. J. Lossing, *Eminent Americans* (1881); L. C. Judson, *The Heroes and Sages of the American Revolution* (1852); *Lives of the Heroes of the American Revolution* (1848).

60. "Deifying Madison does him an injustice...we have to admire...his staggering honesty in reporting the discussion at the convention...of the seventy-one proposals that Madison introduced or argued for during the convention, forty were defeated." D. S. Lutz, *The Origins of American Constitutionalism* (1988), p. 136. Further, the anti-federalists like George Mason and Patrick Henry, not federalists like James Madison, were the driving force behind the First Amendment and the Bill of Rights.

61. The "Shaw Collection" and the "Evans Collection," compiled through cooperation of the American Antiquarian Society, Yale Library, Harvard Library, and Princeton Library, include copies of every work published in America from 1639 to 1812, nearly 100,000 volumes.

62. *Webster's American Biographies* (1974), p. 1144.

we are greatly indebted to his exertions and influence. With his fresh recollections of both constitutions, in his *Course of Lectures*, he states that...Christianity is part of the common-law.⁶³

Gouverneur Morris was the most prolific member of the Constitutional Convention, speaking 173 times on the floor. As head of the Committee on Style, he was responsible for the words over which we so often wrangle. In his *Observations on Government*, Morris offered to the French suggestions on establishing a successful government: "Religion is the only solid basis of good morals; therefore education should teach the precepts of religion, and the duties of man toward God."⁶⁴

Fisher Ames was also a member of the Constitutional Convention and the First Congress. He proposed the wording for the First Amendment finally adopted by the House on August 20, 1789: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."⁶⁵ Ames also wrote about American education:

Most young hearts are tender...Why then...should not the Bible regain the place it once held as a school book? Its morals are pure, its examples captivating and noble. The reverence for the Sacred Book that is thus early impressed, lasts long; and, probably, if not impressed in infancy, never takes firm hold of the mind.⁶⁶

Benjamin Rush signed the Declaration of Independence, led the ratification fight in Pennsylvania, helped form that state's 1790 constitution, and served as U.S. Treasurer. His views on religion in education were widely circulated even years after his death.⁶⁷ He reviewed pro and con arguments on using the Bible as a school book. Significantly, none of these arguments was based on a constitutional or "separation" issue. He concluded with this observation:

In contemplating the political institutions of the United States, I lament that we waste so much time and money in punishing crimes and take so little pains to prevent them...we neglect the

63. *Updegraph v. Commonwealth*, 11 Serg. & R. 403 (1824)

64. H.B. Adams, *Life and Writings of Jared Sparks* (1893), Vol. 2, pp. 487-489, 491.

65. *Annals of Congress* (1834), Vol. I, p. 766.

66. T. B. Wait, *Life of Fisher Ames* (1809), pp. 134-135.

67. *American Tract Society*, Vol. VIII (1823), p. 89ff.

only means of establishing and perpetuating our republican forms of government; that is, the universal education of our youth in the principles of Christianity by means of the Bible.⁶⁸

George Washington, in his Farewell Address of September 19, 1796, spoke as the nation's chief executive:

Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert... And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.⁶⁹

Samuel Adams was a delegate to the Massachusetts ratifying convention and served that state as Lieutenant Governor and Governor. In a letter to John Adams, he wrote:

Let divines and philosophers, statesmen and patriots, unite their endeavors to renovate the age by impressing the minds of men with the importance of educating their little boys and girls, of inculcating in the minds of youth the fear and love of the Deity...and, in subordination to these great principles, the love of their country...in short, of leading them in the study and practice of the exalted virtues of the Christian system.⁷⁰

John Adams wrote back: "You and I agree."⁷¹

Jefferson's own actions concerning religion in education affirm the consistent pattern set by the Founders. He founded the University of Virginia, a school wholly governed, managed, and controlled by the state. He set forth his views in his annual report as Rector dated October 7, 1822, and approved by the Visitors of the University including James Madison. University regulations later provided:

Should the religious sects of this State, or any of them, according to the invitation held out to them, establish within, or adjacent to, the precincts of the University, schools for instruction in the religion of their sect, the students of the University will

68. *Id.* at 99.

69. *Supra* note 50 at Vol. 1, p. 220.

70. *Four Letters Between John Adams Late President of the United States and Samuel Adams Late Governor of Massachusetts* (1802).

71. *Id.*

be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the university at its stated hour.⁷²

This statement, of course, followed Jefferson's oft-quoted letter mentioning a "wall of separation between church and State." Justice Stanley Reed concluded that the wall

that Jefferson built at the University which he founded did not exclude religious education from that school. The difference between the generality of his statements on the separation of church and state and the specificity of this conclusion on education are considerable. A rule of law should not be drawn from a figure of speech.⁷³

Jefferson authored the first plan of public education for Washington, D.C. schools⁷⁴ and installed Watt's Hymnal and the Bible as the primary reading texts for students.⁷⁵ He explained that "[t]he Bible is the cornerstone of liberty...a student's perusal of that Sacred volume will make them better citizens."⁷⁶

B. The Congress That Passed the First Amendment Required Religious Instruction in School

Congress passed both the First Amendment and the "Bill to Provide for the Government of the Territory Northwest of the River Ohio" (the "Northwest Ordinance") at the same time.⁷⁷ That bill contained the requirements for statehood and stated: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."⁷⁸

72. As quoted in *McCullum*, 333 U.S. at 246 (1948) (Reed, J., dissenting).

73. *Id.* at 247.

74. J.O. Wilson, *Public Schools of Washington* (1897), Vol. 1, p. 5.

75. *Id.* at 9.

76. S. McDowell & M. Beliles, *America's Providential History* (1988), p. 148.

77. Debate over the First Amendment lasted from June 7 to September 25, 1789. The same year, the House approved the Northwest Ordinance on July 21, the Senate followed suit on August 4, and President George Washington signed it on August 7. *Supra* note 65 at Vol. I, p. 56, 660. The ordinance was originally adopted under the Articles of Confederation on July 13, 1787, but the Founders considered it so important that they re-passed it under the new Constitution.

78. I. W. Andrew, *Manual of the Constitution of the United States* (1874), Appendix XIII.

As this Court has stated, "prayer is the quintessential religious practice."⁷⁹ The fact that the Founders considered religion an essential part of education makes inconceivable the notion that they would have objected to invocations or benedictions. Indeed, it defies both logic and history to suggest that the Congress would, on the one hand, pass legislation requiring religious instruction and, on the other hand, enact a constitutional provision to invalidate that very legislation. As this Court held in *Marsh v. Chambers*:

It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain [to deliver opening prayers] for each House and also voted to approve the draft of the First Amendment for submission to the states, [that] they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.⁸⁰

The Northwest Ordinance is listed in the annotated version of the *United States Code* along with the Constitution, Declaration of Independence, and Articles of Confederation as one of the "organic laws of the United States of America." Congress made adherence to the Northwest Ordinance a condition of statehood⁸¹ and the newly admitted states used verbatim portions of the Ordinance, specifically its third article, in their constitutions.

On April 30, 1802, Congress passed the enabling act for Ohio.⁸² Consequently, the Ohio constitution of November 1, 1802, states:

Religion, morality, and knowledge, being essentially necessary to the good government and the happiness of mankind, schools and the means of instruction shall forever be encouraged by legislative provision.⁸³

On March 1, 1817, Congress passed the enabling act for Mississippi. The 1817 Mississippi constitution states:

Religion, morality, and knowledge, being necessary to good government, the preservation of liberty and the happiness of

79. *Wallace*, 472 U.S. at 44 n. 22.

80. *Marsh*, 463 U.S. at 790 (1983).

81. See, e.g., the enabling acts for Alabama (Mar. 2, 1819, c. 47, 3 Stat. 489), Illinois (Dec. 3, 1818, 3 Stat. 536), Indiana (Apr. 13, 1816, c. 56, 3 Stat. 289).

82. Apr. 30, 1802, c. 40, 2 Stat. 173 at 174.

83. *The Constitutions of all the United States According to the Latest Amendments* (1817), p. 343.

mankind, schools and the means of education shall be forever encouraged in this state.⁸⁴

The same Congress that prohibited federal laws "respecting the establishment of religion" also required that religion be included in schools. The Founders could not have viewed the latter as violating the former. The same conclusion applies after the ratification of the Fourteenth Amendment. The Nebraska constitution of June 12, 1875, required that:

Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws...to encourage schools and the means of instruction.⁸⁵

V. RELIGIOUS PRACTICES AND TEACHING IN EDUCATION FORM A FUNDAMENTAL PART OF THIS NATION'S HISTORY AND TRADITION

A. Religious Principles Have Long Been Part of American Education

In his opinion below, Judge Bownes believed that historical analysis is irrelevant because "'free public schools were virtually non-existent at the time the Constitution was adopted.'"⁸⁶ He seems to assert that the original understanding of the First Amendment is only important if a case factually parallels conditions or situations within the Founders' specific knowledge or experience. The source of this bizarre interpretive principle remains a mystery and it certainly has not characterized this Court's approach to constitutional questions in the past. Under it, analyzing the Fourth Amendment's application to wire taps, the First Amendment's application to record albums, or the Sixth Amendment's application to videotaped trial testimony would be impossible. Rather, this Court must inquire into the *meaning* of the non-establishment clause as understood by the Founders.

Beyond this general point, the factual question of the existence of free public schools in 1789 matters little since the Founders

84. *Id.* at 389.

85. M.B.C. True, *A Manual of the History and Civil Government of The State of Nebraska* (1885), p. 34.

86. *Weisman*, 908 F.2d at 1096, quoting *Edwards*, 482 U.S. at 583 n. 4 (1987).

mandated in the Northwest Ordinance that *any* system of education teach religion. This included schools managed and controlled by the state, whether or not they were called "free public schools."

The great statesman Daniel Webster successfully argued before this Court that the intended plan of education for a proposed school was "anti-Christian, and therefore repugnant to the law"⁸⁷ and that no school can teach morality without religion.⁸⁸

A report by the Senate Judiciary Committee in 1853 confirmed the role of religious principles in American education: "We are a Christian people...not because the law demands it, not to gain exclusive benefits or to avoid legal disabilities, but from choice and education."⁸⁹

B. The Role of Religious Principles in Education Remained Unaffected by the Fourteenth Amendment

The religious educational policies initiated by the Founders continued past ratification of the Fourteenth Amendment. In 1889, the Commissioner of the United States Bureau of Education,⁹⁰ responsible for the nation's public schools, released a report. In a school offered as a model, the total number of hours devoted to religious instruction surpassed the number of instructional hours dedicated to writing, physics, natural history, or geography, and was equal to the number of hours of instruction in history.⁹¹

In 1890, public school officials in Kansas prepared a historical legacy of education in the state and nation and presented it at the 400th anniversary celebration of Columbus Day. It showed that while education in America had been "nurtured in the lap of the church,"⁹² soon these schools "became so necessary to society at large that the church reluctantly relinquished her claim upon the

87. *Vidal v. Girard's Executors*, 43 U.S. 126, 143 (1844)

88. *Id.* at 153. Also *supra* note 53 at Vol. VI, p. 153-154. This is the only version of Daniel Webster's works prepared under his personal supervision.

89. B. F. Morris, *The Christian Life and Character of the Civil Institutions of the United States* (1864), p. 326 (emphasis added).

90. The United States Bureau of Education was created as a Department on March 2, 1867, and made an Office of the Interior Department on July 1, 1869.

91. *Report of the Commissioner of Education for the Year 1887-88* (1889), p. 886.

92. *Columbian History of Education in Kansas: An Account of the Public School System, An Explanation of its Practical Operations, Compiled by Kansas Educators* (1893), p. 81.

elementary schools, and turned them over to the care of the commonwealths."⁹³ The superintendent of education then commented on this decision:

Whether this was wise or not is not [our] purpose to discuss, further than to remark that, if the study of the Bible is to be excluded from all **State schools**, if the inculcation of the principles of Christianity is to have no place in the daily programme, if the worship of God is to form no part of the general exercises of these **public elementary schools**, then the good of the State would be better served by restoring all schools to church control.⁹⁴

State laws governing public education in 1925 show continuing acceptance of this view:

Florida. Whereas, it is in the interest of good moral training, of a life of honorable thought and good citizenship, that the public school children should have lessons of morality brought to their attention during their school days, therefore be it enacted by the State of Florida...That all schools in this state that are supported in whole or in part by public funds, be, and the same are, hereby required to have once every school day readings in the presence of the pupils from the Holy Bible, without sectarian [denominational] comment.⁹⁵

Delaware: Section 2. In each public school classroom of the state, and in the presence of the scholars therein assembled, at least five verses from the Holy Bible shall be read at the opening...by the teacher in charge thereof.⁹⁶

VI. THE ORIGINAL UNDERSTANDING OF THE FIRST AMENDMENT GENERALLY ENDORSED AND ENCOURAGED RELIGION IN PUBLIC LIFE

The backdrop for the Founders' views on religion in education is their general endorsement and encouragement of religion in public life.

93. *Id.* at 81-82.

94. *Id.* at 82 (emphasis added).

95. *Private Schools and State Laws...Governing Bible Reading in the Public Schools*, compiled by Charles N. Lischka (1926), *Education Bulletins*, No. 2, January, 1926, p. 275.

96. *Id.*

This Court has already noted "an unbroken history of official acknowledgement by all three branches of [the] government of the role of religion."⁹⁷ The Founders who became Presidents used their position within the federal government to endorse and encourage religion and public prayer.⁹⁸ President George Washington stated:

"No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than the people of the United States."⁹⁹ (April 30, 1789); "It is the duty...to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor."¹⁰⁰ (October 3, 1789); "It is...our duty...to acknowledge our many and great obligations to Almighty God and to implore Him to continue and confirm the blessings we experience."¹⁰¹ (January 1, 1795)

Similarly, President John Adams declared:

"The safety and prosperity of nations ultimately and essentially depend on the protection and the blessing of Almighty God, and the national acknowledgment of this truth is...an indispensable duty which the people owe to Him."¹⁰² (March 23, 1798); "As no truth is more clearly taught in the Volume of Inspiration, nor any more fully demonstrated by the experience of all ages, than that a deep sense and a due acknowledgment of the governing providence of a Supreme Being...are conducive

97. *Lynch*, 465 U.S. at 674. See also *McGowan v. Maryland*, 366 U.S. 420, 431-34 (1961).

98. In his opinion below, Judge Bownes stated: "I point out there is formidable religious authority condemning prayer in public: 'And when thou prayest...enter into thy closet, and when thou hast shut the door, pray to thy Father in secret.' Matthew 6:5-7" *Weisman*, 908 F.2d at 1090 n. 1. This is the essence of poor scholarship. Jesus prayed in public three times more often than in private (see, e.g., Matthew 14:19, 15:36, 19:13; Mark 6:41, 8:6-7, 10:16; Luke 3:21, 9:16, 24:50-51; John 6:11, 6:23) and his rebuke in Matthew 6 was against hypocritical prayer designed to attract personal attention from others, not against public prayer. Furthermore, the Founders cited the Bible when discussing the propriety of public prayer. See Roger Sherman, *Supra* note 65 for Sept. 25, 1789.

99. *Supra* note 50 at Vol. 1, p. 52.

100. *Id.* at 64.

101. *Id.* at 180.

102. *Id.* at 268.

equally to the happiness...of individuals and to the well-being of communities."¹⁰³ (March 6, 1799)

President Adams explained further this need to encourage religion in an address to the military in October 1798. He said that "[w]e have no government armed with power capable of contending with human passions unbridled by morality and religion...Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."¹⁰⁴

President James Madison said: "No people ought to feel greater obligations to celebrate the goodness of the Great Disposer of events, and of the destiny of nations, than the people of the United States."¹⁰⁵ (March 4, 1815)

In his "Notes on the State of Virginia," Jefferson asked:

Can the liberties of a nation be thought secure when we have removed their only firm basis, *a conviction in the minds* of the people that these liberties are...the gift of God?¹⁰⁶

John Jay, the first Chief Justice of this Court, stated: "The most effectual means of securing the continuance of our civil and religious liberties, is always to remember with reverence and gratitude the source from which they flow."¹⁰⁷

John Hancock, in his 1780 Inaugural Address as the first Governor of Massachusetts, declared:

Sensible of the importance of Christian piety and virtue to the order and happiness of a state, I cannot but earnestly commend to you every measure for their support and encouragement...and if anything can be further done on the same basis for the relief of the public teachers of religion and morality...I shall most readily concur with you in every such measure.¹⁰⁸

103. *Id.* at 284-85.

104. *Supra* note 52.

105. *Supra* note 50 at Vol. 1, p. 561. Madison made similar statements on July 9, 1812, July 23, 1813, and November 16, 1814; see *id.* at 513, 532, 558.

106. *Supra* note 54 (emphasis added).

107. J. Jay, *The Correspondence and Public Papers of John Jay, 1794-1826* (1970), Vol. IV, p. 477.

108. A. E. Brown, *John Hancock* (1898), p. 269.

In addition to individual Founders, states through their constitutions acknowledged God and the need for religious education. The 1792 New Hampshire constitution explained:

As morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government...the people of this state...do hereby fully empower, the Legislature, to authorize...for the support and maintenance of public...teachers of piety, religion, and morality.¹⁰⁹

The common understanding here is obvious. The Founders, at the state and national levels, sought to encourage religious principles. Courts, applying traditional canons of interpretation, followed suit:

Laws cannot be administered in any civilized government unless the people are taught to revere the sanctity of an oath, and look to a future state of rewards and punishments for the deeds of this life. It is of the utmost moment, therefore, that they should be reminded of their religious duties at stated periods...A wise policy would naturally lead to the formation of laws calculated to subserve those salutary purposes.¹¹⁰

Courts have addressed attempts to separate religious principles from public institutions before:

The assertion is once more made that Christianity never was received as part of the common law of this Christian land; and it is added, that if it was, it was virtually repealed by the constitution of the United States...Christianity, general Christianity, is and always has been a part of the common law...In this the constitution of the United States has made no alteration.¹¹¹

Though the constitution has discarded religious establishments...this declaration (noble and magnanimous as it is, when duly understood) never meant to withdraw religion in general, and with it the best sanctions of moral and social obligation from all consideration and notice of the law.¹¹²

109. *Supra* note 83 at pp. 27-28.

110. *Commonwealth v. Wolf*, 3 Serg. & R. 50 (1817).

111. *Updegraph*, 11 Serg. & R. at 399.

112. *People v. Ruggles*, 8 Johns 290, 296 (1811).

Christianity is part and parcel of the common law...Christianity has reference to the principles of right and wrong...it is the foundation of those morals and manners upon which our society is formed; it is their basis. Remove this and they would fall.¹¹³

This Court reaffirmed these declarations after the Fourteenth Amendment:

The question has seldom been presented to the Courts, yet we find that in *Updegraph v. The Commonwealth*, it was decided that, "Christianity, general Christianity, is, and always has been, a part of the common law...not Christianity with an established church..." And in *The People v. Ruggles*, Chancellor Kent, the great commentator on American law...said: "The morality of the country is deeply engrafted upon Christianity, and not upon the doctrines or worship of [other religions]." And in the famous case of *Vidal v. Girard's Executors*, this Court...observed: "It is also said, and truly, that the Christian religion is a part of the common law."¹¹⁴

The original understanding of the First Amendment is readily determined from the Founders' writings, records, or early judicial rulings. Those arguing for a divorce of basic religious principles and practices from public affairs based on the First Amendment found no allies in the courts or Congress.

VII. THE ORIGINAL UNDERSTANDING OF THE FIRST AMENDMENT WAS THAT GOVERNMENT MAY NOT OFFICIALLY PREFER ONE SECT OVER ANOTHER

In the last few decades, courts seem to have struggled with defining words in the First Amendment such as "establishment," "respecting," or "religion."¹¹⁵ This confusion is of recent vintage. Examining the proposed versions of the non-establishment clause reveal much about its original understanding. On September 3, 1789, several versions were proposed: "Congress shall not make any law...establishing any religious sect or society..."; "Congress shall make no law establishing any particular denomination of

113. *City of Charleston v. S.A. Benjamin*, 2 Strob. 508, 520 (1846)

114. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 470 (1892).

115. See, e.g., *Engel v. Vitale*, 370 U.S. 421, 436 (1962); *Lemon*, 403 U.S. at 612; *Weisman*, 908 F.2d at 1092.

religion in preference to another..."; "Congress shall make no law establishing one religious society in preference to others..."¹¹⁶

Members of Congress relied on their own state constitutions as sources for such proposals.¹¹⁷ Those documents, therefore, shed additional light on the original understanding behind the First Amendment:

NEW HAMPSHIRE, 1784. Part One, Article I, Section 6. And every denomination of Christians...shall be equally under the protection of the laws: and no subordination of any one sect or denomination to another, shall ever be established by law.¹¹⁸

MASSACHUSETTS, 1780. First Part, Article III. And every denomination of Christians...shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law.¹¹⁹

The Word "religion" as it finally appears in the non-establishment clause was used by the Founders interchangeably with "religious sect," "religious society," and "particular denomination." Early courts recognized that official preference among denominations was what the First Amendment prohibited:

Religion is of general and public concern, and on its support depend, in great measure, the peace and good order of government, the safety and happiness of the people. By our form of government, the Christian religion is the established religion; and all sects and denominations of Christians are placed upon the same equal footing, and are equally entitled to protection in their religious liberty.¹²⁰

In 1852, a group, citing the non-establishment clause, petitioned Congress to separate religious practices from public affairs and to cease public prayers. The House and the Senate Judiciary Committees conducted lengthy investigations of the Founders' writings and legislative actions. On January 19, 1853, the following report

116. *Supra* note 65 at 75.

117. See E. S. Gaustad, *Faith of Our Fathers* (1987), Appendix A, p. 157.

118. *Supra* note 83 at 62.

119. *Id.* at 29.

120. *Runkel v. Winemiller*, 4 Harris & McHenry at 450 (1799).

was made in the Senate:

The [First Amendment] clause speaks of "an establishment of religion." What is meant by that expression? It referred, without doubt, to that establishment which existed in the mother-country....They intended, by this amendment, to prohibit "an establishment of religion" such as the English Church presented, or any thing like it. But they had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people...they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistic apathy.¹²¹

On March 27, 1854, the following report was made in the House:

What is an establishment of religion? It must have a creed, defining what a man must believe; it must have rites and ordinances, which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rites; it must have tests for the submissive and penalties for the non-conformist. There never was an established religion without all these....At the time of the adoption of the Constitution and the amendments, the universal sentiment was that Christianity should be encouraged, not any one [denomination]. Any attempt to level and discard all religion would have been viewed with universal indignation...There is a great and very prevalent error on this subject in the opinion that those who organized the Government did not legislate on religion.¹²²

Constitutional scholars after the generation of the Founders reached similar conclusions. President James Madison appointed Joseph Story to the Supreme Court, where he served for 34 years. Justice Story, also a professor at Harvard Law School, outlined the original understanding of the First Amendment in an 1840 treatise:

We are not to attribute this prohibition of a national religious establishment to an indifference to religion in general, and especially to Christianity which none could hold in more reverence

121. *Supra* note 89 at pp. 324, 327.

122. *Id.* at 317, 321.

than the framers of the Constitution¹²³...at the time of the adoption of the Constitution and of the Amendments to it, the general, if not universal, sentiment in America was that Christianity ought to receive encouragement from the State...An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.¹²⁴

VIII. THE FOUNDERS' MOTIVATING INFLUENCES AFFIRM THE CONCLUSIONS ABOUT THE ORIGINAL UNDERSTANDING OF THE FIRST AMENDMENT

In his opinion below, Judge Bownes believed that noting 18th century religious practices "is not a persuasive argument about the meaning of the Constitution because historians have noted that the various religious practices of the government in the nineteenth century were more expansive than at the time of ratification."¹²⁵ Whether correct or not, this observation is irrelevant. What amici urge upon this Court through historical evidence is that the practice at issue in the present case is substantially *less expansive* than anything the Founders accepted and promoted at the time the Constitution was framed and ratified.

A group of scholars embarked on an ambitious ten-year project to determine the source for the Founders' ideas by analyzing more than 15,000 political writings from the founding era (1760-1805). Some 3,154 quotations drawn from these writings were isolated and categorized. The following tables present the authorities the Founders' themselves cited:

123. J. Story, *A Familiar Exposition of The Constitution of the United States* (1840), p. 314.

124. *Id.*

125. *Weisman*, 908 F.2d at 1092 n. 1.

Origin and Distribution of Citations Given in Founders' Writings¹²⁶

Category	1760s	1770s	1780s	1790s	1800-05	% of Total
Bible	24%	44%	34%	29%	38%	34%
Enlightenment	32%	18%	24%	21%	18%	22%
Whig	10%	20%	19%	17%	15%	18%
Common-Law	12%	4%	9%	14%	20%	11%
Classical	8%	11%	10%	11%	2%	9%
Other	14%	3%	4%	8%	7%	6%
Total	100%	100%	100%	100%	100%	100%
n= (number of citations)	216	544	1,306	674	414	3,154

Most Cited Thinkers¹²⁷

Category	1760s	1770s	1780s	1790s	1800-05	% of Total
Montesquieu	8%	7%	14%	4%	1%	8.3%
Blackstone	1%	3%	7%	11%	15%	7.9%
Locke	11%	7%	1%	1%	1%	2.9%
Hume	1%	1%	1%	6%	5%	2.7%
Plutarch	1%	3%	1%	2%	0%	1.5%
Beccaria	0%	1%	3%	0%	0%	1.5%
Cato	1%	1%	3%	0%	0%	1.4%
De Lolme	0%	0%	3%	1%	0%	1.4%
Pufendorf	4%	0%	1%	0%	5%	1.3%
Coke	5%	0%	1%	2%	4%	1.3%
Cicero	1%	1%	1%	2%	1%	1.2%
Hobbes	0%	1%	1%	0%	0%	1.0%
Subtotal	33%	25%	37%	29%	32%	32.4%
Others	67%	75%	63%	71%	68%	67.6%
Total	100%	100%	100%	100%	100%	100%
n= (number of citations)	216	544	1,306	674	414	3,154

Note: The list contains more than 180 names. The last column allows more precise recovery of the number of citations over the era, but all other percentages are rounded off to the nearest whole number. The use of 0% indicates less than .5% of the citations for a given decade rather than no citations whatsoever.

The results of this study, of course, are completely consistent with the pattern of practices outlined above. The Founders quoted the Bible more than one-third of the time and four times as frequently as any other source. This is impressive testimony to the

126. *Supra* note 60 at p. 141. Originally published as "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought," in *American Political Science Review*, LXXVIII (1984), at 189-97.

127. *Id.*

Bible's fundamental importance in the foundation of our government, our Constitution, and our liberties.

IX. CONCLUSION

Rejecting the original understanding of the First Amendment and substituting the religion-hostile *Lemon* test has produced inconsistent results in the lower courts, the dramatic restriction of religious freedom in America, prohibition of practices the Founders' allowed and sought to encourage, and contributed to the general decline in standards and morals among America's youth. None of this is necessary. Reversing the decision below and restoring the non-coercion test would better balance encouragement and freedom of religion.

Respectfully submitted,

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IN THE
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October Term 1990

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v.

DANIEL WEISMAN, *et al.*,

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On Writ of Certiorari to the United States
Court of Appeals for the First Circuit

**BRIEF AMICUS CURIAE OF THE NATIONAL
JEWISH COMMISSION ON LAW AND PUBLIC
AFFAIRS ("COLPA") IN SUPPORT OF PETITIONERS**

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**BRIEF AMICUS CURIAE OF THE NATIONAL
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INTEREST OF THE AMICUS CURIAE

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers and social scientists that has, over the past quarter century, represented the interests of America's Orthodox Jewish community before courts, legislatures, and other governmental bodies.¹ COLPA

¹COLPA has represented the full range of major national rabbinic, congregational, and educational organizations within the Orthodox community. These include:

- a. Agudath Harabonim of the United States and Canada;
- b. Agudath Israel of America;

has filed *amicus curiae* briefs in this Court in many of the leading religious freedom cases decided since COLPA's formation.

COLPA's interest in this case relates not to the narrow issue on which a conflict exists between the decision below and an earlier decision of the Sixth Circuit. *Amici* such as the National School Boards Association, the National Association of State Boards of Education, and the five States that joined to support granting of the writ of certiorari are concerned with whether a public high school graduation program may include an address or prayer in which the deity is invoked. That precise constitutional issue is, in and of itself, not of sufficient significance to the Orthodox Jewish community to warrant the filing of this *amicus* brief.

On the other hand, the multiplicity of lawsuits and related public controversies over this narrow question illustrate the damaging consequences of this Court's continued adherence to the Establishment Clause test of constitutionality first articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). We are filing this *amicus* brief to provide the Court with additional information on the degree to which the *Lemon v. Kurtzman* "three-pronged" test has been invoked in litigation directed at religious observances of Orthodox Jews. We urge the Court to discard the *Lemon v. Kurtzman* test because, in our experience, its vague and overbroad terms provide an incentive for the initiation of meritless litigation and cast a heavy and unjustified burden on religious minorities and on lower courts.

c. National Council of Young Israel;

d. The Rabbinical Alliance of America;

e. The Rabbinical Council of America;

f. Torah Umesorah, National Society of Hebrew Day Schools;

g. The Union of Orthodox Jewish Congregations of America.

ARGUMENT

THE "SECULAR PURPOSE" AND "PRIMARY EFFECT" STANDARDS ARE SO VAGUE AND MEANINGLESS THAT THEY JEOPARDIZE ALL GOVERNMENTAL ACCOMMODATION AND PROTECTION FOR RELIGIOUS OBSERVANCE

In 1962, shortly after its decision in *Braunfeld v. Brown*, 366 U.S. 599 (1961) — which had denied a constitutional exemption from Sunday-closing laws for Sabbatarians — this Court dismissed for lack of a substantial federal question a constitutional challenge under the Establishment Clause to a legislative authorization permitting Sabbatarians to stay open on Sundays. *Arlan's Department Store, Inc. v. Kentucky*, 371 U.S. 218 (1962). That decision was issued nearly one decade before the *Lemon v. Kurtzman* test was articulated. It is obvious, however, that a literal application of the "secular purpose" and "primary effect" components of the *Lemon* test could endanger such an exemption. Individuals who are insensitive to the conscientious convictions of Orthodox Jews could assert that the principal "purpose" of an exemption from Sunday closing laws is to aid Sabbath observance and that the "primary effect" of the exemption is to advance religion by enabling Orthodox Jewish merchants to observe the Sabbath by closing their shops on Saturdays because they may remain open on Sundays.

Experience under *Lemon v. Kurtzman* has proved that its three-part test is, in fact, attractive to potential litigants who lack tolerance for religious observance. In *Jones v. Butz*, 374 F. Supp. 1284 (S.D.N.Y.), *aff'd summarily*, 419 U.S. 806 (1974), an exemption to the federal Humane Slaughter Act for kosher meat was challenged under the *Lemon* criteria. A three-judge court rejected the challenge in a detailed opinion,

and this Court summarily affirmed. But the litigation threatened a central component of the Jewish dietary laws and created grave anxiety — for at least the duration of the lawsuit — within the Orthodox Jewish community.

Statutory and regulatory protection provided to consumers of kosher food in many jurisdictions has also been challenged by individuals who are intolerant or by those who have a commercial motive to deceive food purchasers because kosher products are usually more expensive than non-kosher foods. Appendix I to this brief reports on such a lawsuit lately brought in United States District Court for the District of Maryland. And a constitutional challenge to New Jersey's regulatory protection for kosher consumers was recently rejected by an intermediate appellate court in that State. *Ran-Dav's County Kosher, Inc. v. State*, 243 N.J. Super. 232, 579 A.2d 316 (App. Div. 1990). The case is now pending before the New Jersey Supreme Court.

Opponents of religious observance have not hesitated to invoke the *Lemon* standards to attack governmental accommodations to Jewish religious observance even though the accommodations have absolutely no impact whatever on the remainder of society. For example, by Jewish religious law, carrying on the public streets on the Sabbath is permitted only in an area which is surrounded by a symbolic border known as an "eruv." Telephone wires and overhead electrical cables may be used for this purpose, and in many communities throughout the United States Orthodox Jews have utilized such existing lines to simplify their religious observance of the Sabbath. Although there is no expense whatever to the community where the *eruv* is established and it is not even perceptible to those who do not use it, zealous advocates of the Establishment Clause invoked the *Lemon* "purpose" and "effect"

standards to challenge this innocuous accommodation to Orthodox Jews in federal and state courts. See *American Civil Liberties Union v. City of Long Branch*, 670 F.Supp. 1293 (D.N.J. 1987); *Smith v. Community Board No. 14*, 128 Misc.2d 944, 491 N.Y.S.2d 584 (Sup. Ct. Queens County 1985), *aff'd*, 133 A.D.2d 79, 518 N.Y.S.2d 356 (2d Dept. 1987), *appeal dismissed*, 71 N.Y.2d 891, 527 N.W.S.2d 773, 522 N.E.2d 1071 (1988). The challenges were unsuccessful, but they were taken seriously by the courts, caused anxiety within the Orthodox Jewish community, and strained the community's resources. If not for the overbroad language of the *Lemon* test, these suits would not have been brought.

Nor are we sanguine over judges' ability to distinguish, under *Lemon*'s articulated standards, between sensible accommodations for religious observance and impermissible endorsements or establishments of religion. In the New Jersey kosher regulation case, a dissenting judge was ready to strike down important consumer-protection law because he concluded that the regulations "violate all three prongs of the test synthesized in *Lemon v. Kurtzman*." 243 N.Y. Super. at 359, 579 A.2d at 330. And it appears from the concurring opinion of Judge Bownes in this case that he would give broad literal application to the "secular purpose" component of the *Lemon* standard. His interpretation of "principal effect" leaves little room for governmental accommodation of a minority's religious observance.

Indeed, this Court's own efforts to apply the *Lemon v. Kurtzman* standards encourage confusion over the meaning of the *Lemon* standards. In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), the Court invoked the "primary effect" prong in striking down a state statute that protected religious observance against discrimination in private employment. The fact that the protection in *Thornton* was "absolute and unqualified"

— which was the central basis for the court's decision — was logically irrelevant to its "primary effect." See *McConnell, Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 56 (1986). But by announcing that the Connecticut statute was constitutionally flawed because of its "primary effect," the Court encouraged litigants and judges in lower courts to question all governmental flexibility towards religious minorities.

Shortly thereafter this Court professed to apply the *Lemon* "primary effect" standard in upholding a legislative exemption in *Corporation of Presiding Bishops v. Amos*, 483 U.S. 327, 336-38 (1987), which involved a statutory provision that gave "special considerations to religious groups." 483 U.S. at 338. The message communicated to potential litigants and lower-court judges by these two rulings is that efforts at religious accommodation which judges dislike may be stricken for their "primary effect" while accommodations with which they are sympathetic may be upheld.

The current spate of litigation over benedictions and invocations during public school graduations is, in our view, the natural consequence of this Court's improvident loyalty to the imprecise terms of the *Lemon* test. The same zealotry that drags reasonable governmental accommodations for minority faiths to court is now prompting lawsuits against the practices of the majority. And the same reasoning that led to invalidation of an exemption to a Sunday law because it had the "primary effect" of aiding the religion of Sabbath-observers leads otherwise reasonable federal judges to prohibit reference to a deity in a public ceremony because its "primary effect" is to favor deistic faiths.

The time has come for this Court to jettison the *Lemon* standard and replace it with a constitutional rule that is closer to the original intent of the Establishment Clause. COLPA filed an *amicus* brief when *Lemon v. Kurtzman* was argued, and

we then expressed our concern "that those who are actively erecting the Wall Between Church and State seem to be burying under and in it the religious minorities it was designed to protect." Brief for the National Jewish Commission on Law and Public Affairs as *Amicus Curiae*, Oct. Term 1970, Nos. 89 & 153, p. 7. We argued that non-preferential and noncoercive accommodation to the religious convictions of all citizens does not violate the Establishment Clause.

At this juncture — when the minority religious communities of this country are reeling from this Court's wholly unexpected recent holding in *Employment Division v. Smith*, 110 S. Ct. 1595 (1990), which effectively removes most of the protection heretofore afforded by the Free Exercise Clause of the First Amendment — it is essential that the Establishment Clause not be construed in a manner that would undermine legislative or administrative accommodations to religion. Moreover, the extremes to which the *Lemon* standards have carried this Court, particularly in the area of non-discriminatory governmental assistance to the secular programs of religious institutions, threaten the viability of religious schools and the health of religious communities. We urge the Court to reverse this trend by articulating a new constitutional test for the Establishment Clause.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

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Vendor claims in suit that kosher meat law is unconstitutional

By Sheridan Lyons

A Towson man made a federal case yesterday of his conviction for selling non-kosher meats, claiming that the law he was convicted of breaking and the very existence of Baltimore's Bureau of Kosher Meat and Food Control violate the First Amendment's ban against government establishment of a religion.

George Barghout, owner of Yogurt Plus in Reisterstown Plaza, asked the U.S. District Court to declare the law unconstitutional — and to overturn his conviction in the District Court of Maryland for Baltimore and \$600 fine.

Mr. Barghout's conviction last November followed a dispute that began in September 1980 when an inspector from the bureau complained that hot dogs Mr. Barghout was selling as kosher were put on the same roll as other hot dogs — in violation of the Jewish dietary laws.

The inspector, Rabbi Mayer Kurcfield, informed Mr. Barghout that Yogurt Plus was in violation of the kosher meat ordinance and had to stop advertising kosher hot dogs.

Mr. Barghout refused to sign the inspector's report, or the report that followed.

The enforcement of a religious dietary law by criminal statute

“The consumer should get what they're paying for.”

RABBI MAYER KURCFELD
Inspector

amounts to an active promotion and recognition of the Hebrew religion,” according to the lawsuit, which also argued that a statute created “with the sole function of enforcing orthodox Hebrew religious rules . . . for the purpose of entanglement between government and religion.”

The civil complaint said the law is unconstitutionally vague, and named as defendants Baltimore Mayor Kurt L. Schmoke, the Baltimore City Council, the Bureau of Kosher Meat and Food Control, its chairman, Joseph Nelkin, and Rabbi Kurcfield, the bureau inspector who brought the charges against Mr. Barghout.

Asked to comment on the suit last night, Rabbi Kurcfield said the issue is economic: a vendor falsely advertising a product as kosher to anyone willing to pay a higher price.

Rabbi Kurcfield said he had filed another violation against Mr. Barghout since the November conviction.

“The bottom line is money. It's advertising says kosher . . . because there is a consumer out there who wants kosher,” Rabbi Kurcfield said. “The consumer should get what they're paying for.”

Mr. Nelkin, bureau chairman and a lawyer, said that the issue is one of consumer protection rather than religion and noted that similar challenges have failed in federal courts in New York and New Jersey.

Mr. Barghout said after his conviction that the cooking of the kosher hot dogs with other hot dogs didn't affect their kosher quality because “The flame doesn't contaminate the meat; it purifies it.”

Nov. 24, 1990

Dispute Revolves Around Rotisserie

Baltimore Restaurateur Vows to Fight Fine for Kosher Violation

By Paul W. Valentino
Washington Post Staff Writer

BALTIMORE, Nov. 23—The case started with the lowly hot dog. But if George Barghout has his way, it could be settled by a very high authority, the Supreme Court.

The issue, as he sees it, is separation of church and state. As city officials see it, the issue is false advertising stemming from non-separation of hot dogs.

Barghout, who sells hot dogs at his Yogurt Plus restaurant, was fined \$400 in a city court last week after a food inspector said he defrauded the public by selling some hot dogs as "kosher" even though they had shared a rotisserie with non-kosher hot dogs.

Under traditional Jewish dietary law, as adopted by the Baltimore city code, kosher foods cooked with non-kosher foods become "contaminated" and thus lose their kosherness.

This, in turn, means any advertisement for commingled food as "kosher" is fraudulent.

That is where Barghout ran afoul of the law.

But to him, the issue is not whether he cooked Mogen David kosher hot dogs side-by-side with

his deluxe non-kosher beef franks and then advertised them separately. The issue, he says, is whether a food inspector representing the city government should be allowed to enforce the laws of a religion.

"It is a violation of church and state separation" under the Consti-

"Of the 200 violations I've cited in the last four years, he's the only one" to contest it.

— Rabbi Mayer Kurcfield

tution, Barghout said today. "I will appeal my guilty verdict," to the Supreme Court, if necessary, he said.

But wait. There's more: Barghout, 54, a Palestinian who came to the United States 31 years ago, said his prosecution by specially trained rabbinical food inspectors is an effort by "Zionists to drive me out of business."

Not so, responds Rabbi Mayer

Kurcfield, a member of the Baltimore city-county Bureau of Kosher Meat and Food Control, which enforces the food preparation laws observed by many of the 92,000 Jews in the Baltimore area.

He said Barghout was prosecuted "as a last resort" after more than a year of negotiating. He said Barghout repeatedly refused to take remedial action suggested by officials, such as cooking his kosher and non-kosher hot dogs in separate rotisseries or removing the word "kosher" from billboards at his restaurant.

"Of the 200 [kosher] violations I've cited in the last four years," Kurcfield said, "he's the only one who contested it. That's why we prosecuted him."

He said most kosher food handlers correct violations "on the spot."

Calling an alleged Zionist conspiracy "a lot of baloney," Kurcfield said he is even-handed in his justice. Last year, he prosecuted Caplan Bros., a Jewish-owned meat market, for falsely representing chickens as kosher. The owners were fined \$500 each and ordered to serve 18 months' probation and perform 100 hours of community service.

Kurcfield said state enforcement

See HOT DOGS, D5, Col. 8

Baltimore Man Cited Under Kosher Code

HOT DOGS, From D1

of Jewish food preparation laws has been challenged in the courts of other states "but has not yet been overturned." The purpose of the laws, he said, "is to protect consumers who want to buy a kosher item" and prevent fraud through misrepresentation.

Kurcfield said many non-Jews, including Moslems, buy kosher food, not for religious reasons, but for cleanliness and taste, even though it often costs more.

Barghout said he should not have to buy a second rotisserie, costing \$700, just to satisfy kosher rules. He argued that by cooking kosher and non-kosher hot dogs on opposite sides of his rotisserie, they are satisfactorily separated.

But Kurcfield said grease from the two kinds of franks "drips one onto the other" as they turn.

A spokeswoman for the D.C. food inspection branch said there are no rabbis or other special inspectors on the city payroll checking for compliance with kosher laws.